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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 361

(THOMAS WILSON), W. C. CANNER AND MILLIE A. SOWELL,

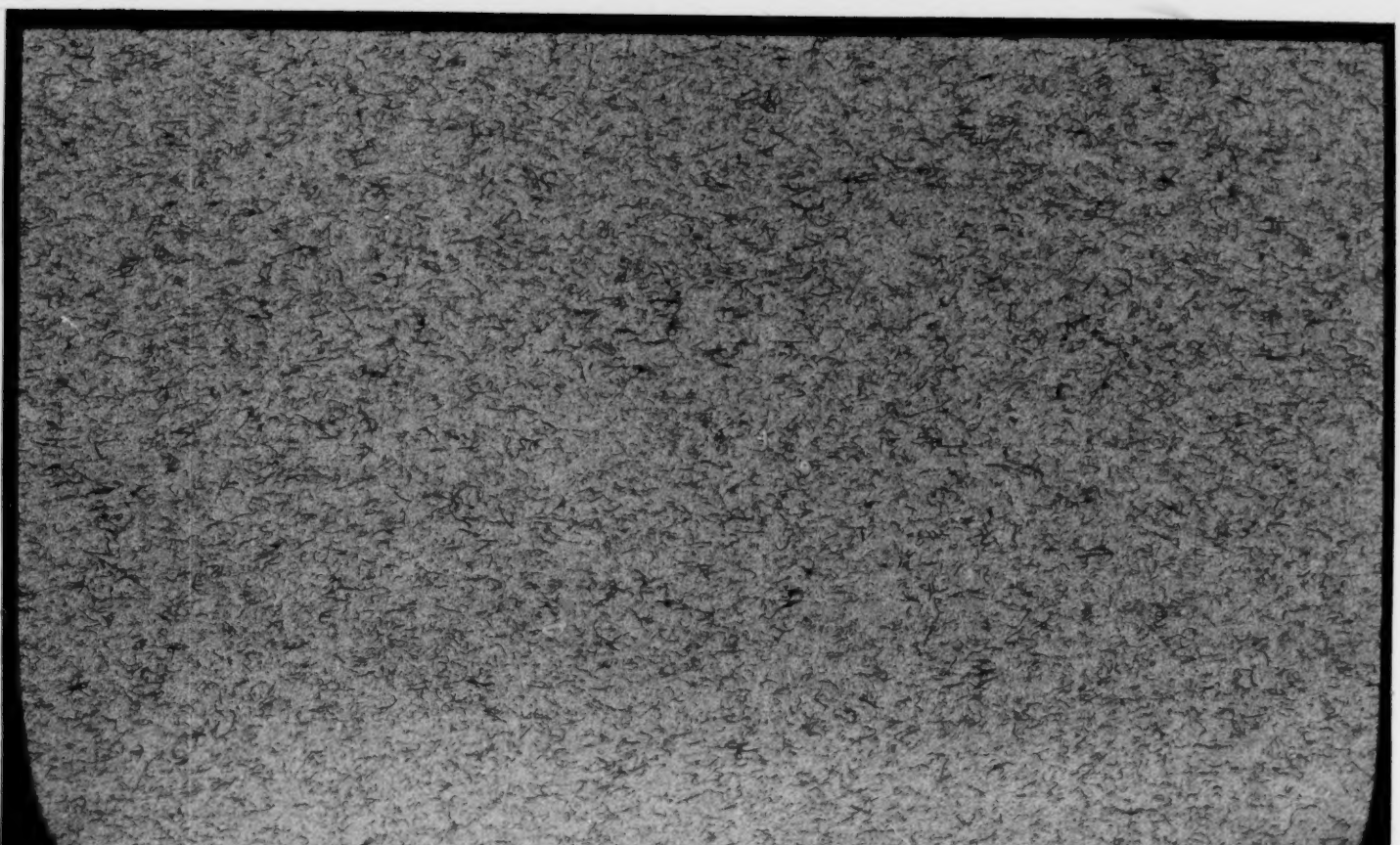
Petitioners,

vs.

STATE EX REL. W. D. McGEE, TREASURER AND EX OFFICIO COLLECTOR OF DUNKLIN COUNTY, MISSOURI, FOR THE USE AND BENEFIT OF DRAINAGE DISTRICT NO. 4, ETC.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

BOB GRAEBLIN,
LANGDON B. JONES,
Counsel for Petitioners.



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2. In holding that the decision of the Missouri Supreme Court, Division No. 1, in the Redman case in March, 1917, was not res adjudicata and did not constitute such a rule of property in the State of Missouri that would be protected by a subsequent decision of the Court as guaranteed by Article I, Section 10, and Sec. 1 Amendment XIV, of the Federal Constitution	22
3. In ruling that supplemental assessments could be made in Drainage District	

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No. 4 without any notice to the landowners, denying to Petitioners the applicable ten-year statute of limitations of Missouri, and by such rulings denied to petitioners and other landowners in Drainage District No. 4 the protection guaranteed to them by the due process clause of Sec. I Amendment XIV of the Federal Constitution 22

4. In holding that the Federal Decisions hereinbefore referred to reported in 17 Fed. Supp. 128, and 119 Fed. (2d) 390, could not be reviewed and reopened and were res adjudicata against the landowners in Drainage District No. 4, who were not parties to said actions; thus denying due process of law as guaranteed by Sec. 1, Amendment XIV of Federal Constitution .. 23

5. In sustaining the validity of the assessment made in this case in the year 1941, under the 1913 Act when said 1913 Act had been specifically repealed in its entirety in 1919, 22 years before the assessment was made; thus denying to petitioners and other landowners in Drainage District No. 4 due process of law as guaranteed by Section 1, Amendment XIV of the Federal Constitution 23

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SUPREME COURT OF THE UNITED STATES

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vs.

STATE EX REL. W. D. McGEE, TREASURER AND EX OFFICIO COLLECTOR OF DUNKLIN COUNTY, MISSOURI, FOR THE USE AND BENEFIT OF DRAINAGE DISTRICT NO. 4, ETC.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI, DIVISION 2

To the Hon. Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, W. C. Caneer and Millie A. Sowell, respectfully petition for a Writ of Certiorari to review the final judgment and decision of Division No. 2 of the Supreme Court of the State of Missouri reversing a judgment for and in favor of Petitioners and against the Plaintiff in said action brought against your Petitioners as rendered by the Circuit Court of Dunklin County, Missouri.

The action brought against your Petitioners was an action to recover an assessment against the lands of your Petitioners and all other landowners in Drainage District No. 4 of Dunklin County, Missouri, said petition being filed in the Circuit Court of Dunklin County, Missouri, and alleging that an assessment made by the County Court of Dunklin County, Missouri, in the year 1941 was a valid assessment and could be sustained under the provisions of an Act of the General Assembly of the State of Missouri in 1913.

The petition alleged that Drainage District No. 4 was organized by judgment of the County Court of Dunklin County, Missouri, on September 27th, 1905, R. 1.

That benefits were assessed against all the lands in said Drainage District No. 4 in the sum of $72,513.99, but that the County Court in its judgment of September 27th, 1905, only assessed against the lands for said construction the sum of approximately $36,000.00, but the County Court of Dunklin County issued and sold bonds aggregating $55,-977.77, R. 2; that in or about the year 1912 it was discovered that the County Court had issued approximately $20,-000.00 in principal bonds in excess of the assessments made by the Court for the improvements, R. 3; that upon such discovery on April 29th, 1912, the County Court of Dunklin County made a new assessment against the lands in Drainage District No. 4 sufficient to pay the excess bonds of $20,-000.00 which assessment was resisted by the landowners resulting in an opinion of the Missouri Supreme Court holding the assessment made by the Court to be absolutely void, and that the County Court was without power to make any additional assessment under the law in which said Drainage District was organized by final judgment on September 27th, 1905. This case was pleaded as the case of *"State ex rel Dunklin County, Collector, for the use of Drainage*

District No. 4, etc., vs. *Redman,*" reported in 270 Mo., 465, 194 S. W., 260, R. 3, 4; said petition then alleged the 1913 Act of the General Assembly of Missouri as the applicable law to support the assessment against the lands of the Petitioners herein, together with all landowners in said Drainage District, R. 4.

The petition alleged the date of the Redman decision by the Missouri Supreme Court to be March 30th, 1917, R. 4, and alleged that on December 30th, 1932, the owner of these approximately $20,000.00 in principal bonds instituted an action in the U. S. District Court for judgment on said bonds and procured judgment on said bonds against the members of the County Court of Dunklin County, Missouri, as the Board of Directors of said Drainage District and against Drainage District No. 4 on the — day of April, 1937, in the principal sum of $21,021.55, R. 5.

Said petition alleged that thereafter a Writ of Mandamus was issued out of the U. S. District Court commanding the County Court of Dunklin County, Missouri, to levy an assessment against the lands in Drainage District No. 4 to pay off the Murphy judgment of $21,021.55, and that pursuant to said Writ of Mandamus in the year 1941 the County Court of Dunklin County, Missouri, made the assessment against all of the lands in Drainage District No. 4, including the lands of your Petitioner to pay off the Murphy judgment, R. 6, 7.

That under the provisions of the 1913 Act of the Missouri General Assembly this assessment was extended as a tax against all the lands in Drainage District No. 4 including the assessment against the lands of your Petitioners, and that said assessment was not paid and became delinquent on December 31st, 1941, R. 7; said petition then alleged the ownership of the lands by your petitioners herein and in other counts the ownership of all other lands

included in said drainage district, and prayed judgment for said assessment, same to be declared as a special lien on the lands of your petitoners, R. 7, 9.

To this petition to recover said assessments against the lands of your petitioners, petitioners herein filed Answer, which Answer appears in the record pages 10 to 27; the Answer among other things alleged that Drainage District No. 4 was finally created and established by final judgment of the County Court of Dunklin County on September 27th, 1905, and under the law at that time applicable to organization of County Court Drainage Districts, R. 11.

That all of the improvements contemplated by said Drainage District No. 4 were fully completed prior to the passage of the 1913 Amendment to the County Court Drainage District Law, R. 14, and said Answer pleaded that said Act of 1913 was not and could not be applicable to the organization of Drainage District No. 4 for the reason that to apply said 1913 Act to a drainage district organized in 1905, and all improvements completed prior to the passage of the 1913 Act would violate Amendment V, Section 1, Amendment XIV and Section 10, Article I of the Constitution of the United States, and would also violate Sections 15 and 30 of Article II of the Missouri Constitution, R. 12, 17, 23; said Answer further alleged that the 1913 Act declared upon by Plaintiff's petition was expressly repealed in its entirety in the year 1919 and was no longer a law of the State of Missouri, R. 12. Said Answer further pleaded the opinion of the Supreme Court heretofore referred to in the *Redman* case, 270 Mo., 465, 194 S. W., 260, as full and complete res adjudicata, which decision became a rule of property in the State of Missouri, applicable to the lands in Drainage District No. 4, and which had remained a rule of property from the time of the rendition of said opinion on March 30th, 1917, up to the date of the filing of said

Answer, R. 18, 19, 20, 21; said Answer further pleaded the ten-year statute of limitations of the State of Missouri, R. 13; said Answer further pleaded that your petitioners herein acquired their lands in Drainage District No. 4 and against which the assessment was made long after the decision of the Supreme Court of Missouri in the *Redman* case in 1917 and prior to the judgment obtained by Murphy against the Drainage District in 1937, R. 14; said Answer further pleaded that the judgment of the County Court finally creating and organizing Drainage District No. 4 rendered on September 27th, 1905, was a final judgment; that the landowners of said Drainage District were then discharged out of Court, and that they had no day in Court to protest the assessment made against their lands and sued on in this case, and pleaded that under the provisions of the Federal and Missouri State Constitutions above referred to they could not be deprived of their property without due process of law, R. 16, 17; said Answer further pleaded that neither the Petitioners nor any other landowners in Drainage District No. 4 were parties to either the action brought by Murphy for judgment on the bonds or the mandamus proceeding hereinbefore referred to R. 15, 16; said Answer further pleaded that by the provisions of Section 8301 and 8301a, appearing in Laws of Missouri for the year 1905 at pages 188 and 189, the assessments made by the County Court on September 27th, 1905, were the only assessments out of which the bonds upon which Murphy obtained judgment could be paid off and discharged, R. 18; said Answer further pleaded that the final judgment rendered by the County Court on September 27th, 1905, constituted a contract between the landowners of Drainage District No. 4 and the purchaser of the bonds of Drainage District No. 4,

and alleged that the petitioners and all other landowners had paid off in full the assessments made by the County Court in its final judgment of September 27th, 1905, R. 18, 19.

The Reply filed to the Answer of Petitioners admitted the repeal of the 1913 Act, R. 29; admitted that the judgment rendered by the County Court on September 27th, 1905, was a final judgment, R. 31, and in general admitted all of the essential portions of Defendant's Answer except the conclusions from the facts admitted.

The Reply appears, R. 27, pages 27 to 37.

The Reply further denied that the *Redman* case hereinbefore referred to constituted res adjudicata but pleaded that the decisions of the Federal Court wherein Murphy obtained judgments on his bonds reported in 17 Fed. Supp. 128, and in the mandamus proceedings, 119 Fed., (2d) 390, constituted res adjudicata, R. 27, 28.

The decision of the Circuit Court of Dunklin County, Missouri, was in favor of your petitioners and all other landowners in Drainage District No. 4, R. 62 to 68.

Upon appeal to the Missouri Supreme Court the case was assigned to Division No. 2 and an opinion rendered by said Court on April 11th, 1949, R. 78, 79; Motion for Rehearing and in the Alternative to Transfer to Court en Banc was filed on April 23rd, 1949, R. 85, said Motion being overruled on May 9th, 1949, R. 108.

Opinions Below

The opinion of Division No. 2 of the Supreme Court is reported in State ex rel McGee, Collector for the Use And Benefit of Drainage District No. 4, etc., *vs.* Thomas G. Wilson, et al., 220 S. W., (2d) 6, (not yet officially reported), copy of opinion, R. 79 to 85.

Other Opinions Involved

The opinion of the Missouri Supreme Court, Division 1, reported in *State ex rel Dunklin County, Collector to Use of Drainage District No. 4, etc.*, v. *Redman*, 270 Mo., 465, 194 S. W., 260.

The opinion of the United States Court of Appeals reported in *Drainage District No. 4* v. *Murphy*, 119 Fed. (2d) 390.

The opinion of the United States District Court in *Murphy* v. *Drainage District No. 4, et al.*, reported in 17 Fed. Supp. 128.

Jurisdiction

This is an action brought by the Collector of Dunklin County, Missouri to the use of Drainage District No. 4 against petitioners herein, W. C. Caneer and Millie A. Sowell and all other land owners included within the boundaries of Drainage District No. 4 of Dunklin County, Missouri. The action was brought on an additional assessment against the lands in Drainage District No. 4 made by the County Court of Dunklin County, Missouri, in 1941, said assessment being made pursuant to and under command of a writ of mandamus issued from the United States District Court, Eastern Judicial District of Missouri.

Drainage District No. 4 was organized pursuant to the County Court Drainage District Law of Missouri that was in effect on September 27, 1905, the date of final judgment of the County Court organizing the district and assessing specific amounts against each tract of land in said drainage district for the payment of construction R 1, 2, 14.

It was admitted in the trial of the case in the Circuit Court of Dunklin County that all improvements contemplated by Drainage District No. 4 were fully completed in the year 1912, R. 7, 14, 30. The answer alleged, the reply

admitted, that the judgment of the County Court on September 27, 1905 was a final judgment, R. 14, 31. The benefits assessed against all the lands in said drainage district aggregated $72,513.99 but the County Court in said final judgment of September 27, 1905 assessed against all the lands in said drainage district for the entire construction of said work an amount aggregating approximately $36,000.00, R. 2; but the County Court sold principal bonds in the aggregate of $55,977.77, R. 2.

In 1912 it was discovered by the bond holders that the County Court in 1905 in its final judgment had not provided for payment of approximately $20,000.00 in principal bonds issued and application was made for and the County Court sustained such application for an additional assessment against the lands in said drainage district to pay off these approximately $20,000.00 in principal bonds and interest, R. 3; the land owners resisted this additional assessment and final judgment was rendered on the validity of such additional assessment by the Missouri State Supreme Court on March 30, 1917 in a cause entitled "*State ex rel. Douglass, Collector, for the use of Drainage District No. 4* v. *C. C. Redman*, 270 Mo. 465, 194 S. W. 260."

Before the *Redman* case reached the Missouri Supreme Court on appeal the General Assembly of Missouri amended the County Court Drainage Law by what is referred to throughout the record as the 1913 Act. In the Appendix attached hereto we have set out in full the sections of the County Court Drainage District Law as it existed in 1905, which the Missouri State Supreme Court considered in the Redman opinion; and we have also set out in the Appendix attached the sections of the 1913 Act which the Missouri Supreme Court took into consideration as the basis of the opinion rendered against petitioners herein and which it is sought by this application to quash.

In 1919 the Missouri General Assembly repealed the 1913 Act in its entirety and enacted entirely new County Court Drainage District Law; we have set out in the Appendix attached the pertinent provisions of the title to the 1919 Act repealing the 1913 Act.

Nothing further was done relative to this controversy until more than fifteen years after the decision of the Missouri Supreme Court in 1917 until in December 1932 when Joseph D. Murphy as the owner of the bonds that were issued in excess of the assessments made by the County Court in 1905, brought suit in the Federal Court against the Drainage District and against Dunklin County for judgment on the bonds, none of the land owners being parties to this action, R. 5.

In 1937 the United States District Court rendered judgment in favor of Murphy and against the defendants in that case for approximately $21,000.00 and this judgment was not appealed from. This case is reported as *Joseph D. Murphy* v. *Drainage District No. 4, et al.*, 17 Fed. Supp. 128.

Thereafter a writ of mandamus was sued out in the United States District Court commanding the County Court of Dunklin County, as the Board of Directors of Drainage District No. 4, to levy a tax against all the lands of said drainage district to pay the Murphy judgment, R. 6; again the land owners were not made parties to this action but the members of the County Court as the Board of Directors of said Drainage District No. 4 resisted the issuance of said writ and the case was finally disposed of by the United States Court of Appeals in a case entitled "*Drainage District No. 4 et al.* v. *Murphy*, 119 Fed. (2d) 390."

It was in response to the command of the writ of mandamus that the County Court made the assessment against all the lands in Drainage District No. 4 in the year 1941 and

suit was brought upon these assessments in December, 1946, R. 7.

It was admitted that all of the original assessment made by the County Court by its final judgment of September 27, 1905 and aggregating $36,000.00 had been paid and that the purpose of the suit against all the land owners in Drainage District No. 4 is to pay off the Murphy judgment, R. 2, 3, 6, 7; the logical conclusion therefore, is that the real party in interest in this case in opposition to petitioners is Murphy, the holder of the judgment, and if this assessment be collected the entire proceeds of such collection will go to Murphy to pay off his judgment and the Collector of Dunklin County, Missouri, is a mere nominal party in this case.

Upon trial in the Circuit Court of Dunklin County, it was stipulated the count of the petition against petitioners Caneer and Sowell would be tried and then the same judgment would be entered against other land owners included in other counts of the 264 count petition, R. 9.

The Circuit Court of Dunklin County rendered judgment in favor of petitioners, R. 62 to 68, but on appeal the Missouri Supreme Court, Division 2, reversed and remanded the cause, with directions to enter up judgment against petitioners and all other land owners in Drainage District No. 4.

The judgment of the Supreme Court of Missouri, Division 2, was entered on April 11, 1949, R. 79 to 85, and petitioners motion for rehearing and in the alternative motion to transfer to the Supreme Court en banc was overruled on May 9, 1949, making the judgment final unless said opinion of the Missouri Supreme Court, Division 2, be quashed by this Court.

As heretofore shown, there was included in the answer of the petitioners a pleading which raised the following issues:

1. That the 1913 Act upon which the plaintiff's petition was based had been specifically repealed in 1919 and was not a law in existence thereafter, R. 12.

2. That suit had been brought on the assessment made by the County Court in April, 1912 against the land owners in Drainage District No. 4 which had resulted in a final judgment by the Missouri Supreme Court, Division 1, in the Redman case above referred to; that said Redman decision had been rendered in March 1917 and that the Redman case constituted full res adjudicata and in addition thereto that the Redman opinion constituted a rule of property after its rendition upon which the lands in Drainage District No. 4 were bought and sold, mortgages taken, etc.; that the petitioners, Caneer and Sowell, purchased their lands involved herein after the Redman decision and before any judgment was ever obtained by Murphy against the Drainage District in 1937, R. 14, 18 to 21.

3. That even if the 1913 Amendment was an existing law it could not be applicable to the organization and proceedings relative to Drainage District No. 4 because final judgment had been rendered on September 27, 1905 and the improvements entirely completed in 1912; that to give effect to the 1913 Act as applicable to Drainage District No. 4 would violate Art. I, Sec. 10 of the Federal Constitution and would also violate Art. II, Sec. 15 of the Missouri Constitution, R. 11, 12, 17, 23, 7.

4. That the judgment rendered by the County Court on September 27, 1905 was a final judgment and constituted a contract between the land owners and the purchasers of the bonds issued by the County Court, and in addition thereto said final judgment discharged all of the lands included in Drainage District No. 4 out of Court; that said land owners were not parties to either of the proceedings above referred to in the Federal Court, had never had any notice of the making of such assessment against their lands by the County Court in 1941 and had never had their day in Court to be heard on such assessment; and that by reason thereof said

petitioners and other land owners in said drainage district had been denied due process of law, contrary to Sec. 1, Amendment XIV to the Federal Constitution and contrary to Art. II, Sec. 30 of the Missouri Constitution, R. 18, 15, 16, 17, 23.

5. Said answer further pleaded that if any right ever existed in the bondholders to obtain an additional assessment against the lands in Drainage District No. 4, said right accrued at the date of the passage of the 1913 Act and was barred by the ten year statute of limitations of Missouri in 1923, R. 13; the applicable ten year statute of limitations referred to is Sec. 1013, R. S. Mo. 1939, and is shown in the Appendix attached hereto.

The opinion of the Missouri Supreme Court, Division 2, in reversing judgment of the trial court in favor of petitioners and other land owners in said drainage district, ruled that the 1913 Act was applicable to the assessments made in this case in the year 1941 and sustained said assessment under said 1913 Act of Missouri, and particularly under Sec. 5588 referred to in the opinion R. 83, and Sec. 2 of the 1913 Act, R. 83.

The Missouri Supreme Court in said opinion did not rule and has not yet passed upon the question of the applicability of the ten year statute of limitations but did rule and pass upon the five year statute of limitations relative to the collection of the assessment, a point which these petitioners did not raise at any time in the case, R. 79 to 85.

Federal constitutional provisions and cases by this court construing said Federal Constitutional provisions, which it is believed sustain jurisdiction, are:

Art. I, Sec. 10, Federal Constitution;
Sec. 1, Amendment XIV, Federal Constitution;
Amendment V, Federal Constitution;
Terre Haute &c Railroad Co. v. *Indiana,* 194 U. S. 579, l. c. 585, 586, 587, 589;
Muhlker v. *Harlem Railroad Co.,* 197 U. S. 544, l. c. 562, 570;

Louisiana v. *Pilsbury*, 105 U. S. 278, l. c. 294:
Columbia Railway, Gas, etc. v. *South Carolina*, 261 U. S. 236, l. c. 243, 244, 245, 251;
Houston & Texas Central Railroad Co. v. *Texas*, 177 U. S. 66, l. c. 74, 99, 100;
Cross Lake Shooting & Fishing Club v. *Louisiana*, 224 U. S. 632, l. c. 638;
Detroit United Railway v. *Michigan*, 242 U. S. 238, l. c. 246, 247, 249, 253;
Louisville Gas Co. v. *Citizens Gas. Co.*, 115 U. S. 683, l. c. 697;
Douglass v. *County of Pike*, 101 U. S. 677, l. c. 685, 687.

Constitutional Provisions and Statutes Involved

The Federal constitutional provisions involved are Art. I, Sec. 10, Amendment V, and Sec. 1, Amendment XIV, the pertinent portions of which are set out in the Appendix attached.

Applicable provisions of the Missouri County Court Drainage District Law as it existed in 1905, provisions of the 1913 Act which formed the basis of the opinion of the Missouri Supreme Court, Division 2, and the title to the 1919 Act of the Missouri General Assembly repealing the 1913 Act are set out in the Appendix attached.

Questions Presented

The petition alleged that the assessment of the County Court made in 1941 was valid under the provisions of the 1913 Act of the Missouri General Assembly, R. 7. The Missouri Supreme Court, Division 2, sustained the assessment under the provisions of the 1913 Act which had been specifically repealed in its entirety by the Missouri General Assembly in the year 1919, more than eighteen years before Murphy obtained judgment in the Federal Court on the

bonds in 1937 and more than twenty-two years before the assessment was made by the County Court in 1941.

This presents for decision by this Court, Federal questions as follows:

1. Can an act of the Missouri Legislature passed and enacted in the year 1913 but specifically repealed in 1919 be revived and again become a law applicable to the land owners in Drainage District No. 4 by judicial decision and without action of the Missouri General Assembly to reenact the repealed act?

2. When Drainage District No. 4 was finally organized by final judgment of the County Court on September 27, 1905, all improvements completed in the year 1912, even if the 1913 Act was still in existence, can this subsequent legislation impair the contract made between the land owners and the purchasers of the bonds under the final judgment of the County Court in September, 1905, and be made applicable to the land owners in Drainage District No. 4 under the provisions of Art. I, Sec. 10, of the Federal Constitution?

3. When the Missouri Supreme Court, Division 1, in March 1917 ruled that the judgment of the County Court on September 27, 1905 was a final judgment and the land owners in said drainage district discharged out of Court and when said judgment of the Missouri Supreme Court in the *Redman* case had been rendered more than fifteen years before Murphy filed suit upon the bonds in the Federal Court in December 1932, and more than twenty years before Murphy obtained judgment in the Federal Court in April, 1937, and when the *Redman* opinion of the Missouri Supreme Court ruled adversely to assessments made to pay off the very bonds which were merged in judgment in the *Murphy* case, did not the *Redman* decision in 1917 become a rule of property and conclusive against any change in such rule of property by the subsequent decision of the Missouri Supreme Court, Division 2, so that to apply the last decision of the Missouri Supreme Court would

violate all the provisions of the Federal Constitution hereinbefore referred to?

4. When the *Redman* opinion above referred to ruled that the judgment of the County Court on September 27, 1905 was a final judgment and the land owners in said drainage district discharged out of Court and when it is admitted that the land owners had no notice of the assessment made by the County Court in 1941 and involved in this case, and when the land owners were not parties to either of the proceedings in the Federal Court by Murphy, can such assessment be ruled valid without such land owners having their day in Court, and a hearing on such assessments, without violating due process clause of the Federal Constitution as incorporated in Sec. 1, Amendment XIV?

5. Can the Missouri Supreme Court refuse, as it did in the opinion and judgment rendered, to refuse to give the petitioners and other land owners in Drainage District No. 4, the benefit of an applicable statute of the State of Missouri as embodied in the statute pertaining to the ten year limitation on one's right to enforce an action, thus denying to petitioners and other land owners in Drainage District No. 4 due process of law as guaranteed by Sec. 1, Amendment XIV, to the Federal Constitution?

6. Can petitioners and other land owners in said drainage district be foreclosed by the decisions rendered by the United States District Court in the case of *Murphy* v. *Drainage District No. 4 et al.*, 17 Fed. Supp. 128 and the mandamus proceedings in *Drainage District No. 4, et al.*, v. *Murphy*, 119 Fed (2d) 390, when it is admitted that the land owners were not parties to either of said action without doing violence to the due process clause of the Federal Constitution as incorporated in Sec. 1, Amendment XIV?

Statement

It is believed that what has heretofore been presented together with the provisions of the Federal Constitution and

Statutes involved set forth in the Appendix hereto attached, contains sufficient statement of what is involved in this controversy without being repeated here in a separate statement; for such reason and for brevity we omit any further statement of the issues.

Basis of Opinion of the State Court

The opinion of the State Court ruled:

1. That the 1913 Act and particularly Sections 5588 and 2 were applicable and the assessment could be sustained under said 1913 Act. R. 83.

2. That the judgments in the Federal cases heretofore enumerated could not be reopened and reviewed by the Court and were binding upon the land owners. R. 85.

3. That the decision of the Missouri Supreme Court, Division 1, rendered in March 1917, was not *res adjudicata* in this case, said ruling in effect denying that the decision in the *Redman* case under all the facts in this case became a rule of property. R. 81.

4. The Court ruled in effect that even though the County Court in its final judgment rendered on September 27, 1905, did not provide for the payment of all of the bonds that it thereafter issued, that still such error of the County Court could be corrected without notice to the land owners regardless of the lapse of time that had intervened between the date of said final judgment in 1905 and 1941, and ignoring the question of the ten year statute of limitations to any right to obtain an additional assessment or to amend by proper petition the final judgment of the County Court made on September 27, 1905. R. 79 to 85.

5. The State Supreme Court further evidenced its reliance upon the 1913 Act to sustain the assessment in this

case by citing in the opinion filed a decision of the Missouri Supreme Court *en banc*, rendered in the case of *State ex rel.* v. *General American Life Insurance Company*, 336 Mo. 829, 85 S. W. (2d) 68, a decision rendered by the Supreme Court of Missouri under the 1913 Act and which was applicable to that case as it arose before the repeal of the 1913 Act in 1919. R. 81.

6. The Court then ruled that supplemental assessments could be made by the County Court without any notice to the land owners and without giving them their day in court and that such ruling disposed of the constitutional questions presented by the land owners. R. 83, 84; this ruling in effect also constituted a ruling that the final judgment rendered by the County Court on September 27, 1905, did not constitute a contract between the land owners and the purchasers of the bonds and that by reason thereof Art. I, Sec. 10, and Sec. 1, Amendment XIV of the Federal Constitution were not violated.

Reasons for Granting the Writ

I

Petitioners contend that the final judgment of the County Court on September 27, 1905, constituted a contract between the land owners and the purchasers of the bonds thereafter issued, which contract could not be thereafter impaired by the subsequent legislation involved in the 1913 Act, even if the 1913 Act had not been repealed; because to make such subsequent legislation applicable and thus impair the obligation of a contract would do violence to Art. I, Sec. 10 of the Federal Constitution.

Columbia Railway, Gas, etc. v. *South Carolina*, 261 U. S. 236, l.c. 243, 244, 245, 251;

Houston & Texas Central Railroad Co. v. *Texas*, 177 U. S. 66, l.c. 74, 99, 100;

Cross Lake Shooting & Fishing Club v. *Louisiana*, 224 U. S. 632, l.c. 638;
Detroit United Railway v. *Michigan*, 242 U. S. 238, l.c. 246, 247, 249, 253;
Louisville Gas Co. v. *Citizens Gas Co.*, 115 U. S. 683, l.c. 697;
Terre Haute, &c Railroad Co. v. *Indiana*, 194 U. S. 579, l.c. 585, 586, 587, 589.

II

That the decision of the Missouri Supreme Court, Division 1, in the *Redman* case in March, 1917, under the facts of this case as heretofore outlined became and was *res adjudicata* in this case; that such decision in the *Redman* case became a rule of property that could not be thereafter changed by a subsequent decision of the Missouri Supreme Court without impairing the obligation of a contract any more than the obligation of the contract could be impaired by subsequent legislation.

Douglass v. *County of Pike*, 101 U. S. 677, l.c. 685, 687;
Louisiana v. *Pilsbury*, 105 U. S. 278, l.c. 294;
Muhlker v. *Harlem Railroad Co.*, 197 U. S. 544, l.c. 562, 570.

III

That the State Supreme Court in giving full effect to the Act of 1913 which had been specifically repealed in 1919, by ruling that the County Court could make supplemental assessments without notice to the land owners under the facts of this case and in refusing to apply the ten year applicable statute of limitations, denied to petitioners and other land owners in said drainage district due process of law as guaranteed by Section 1, Amendment XIV of the Federal Constitution.

See Authorities under I, II.

IV

That the Missouri Supreme Court in ruling that the Federal cases hereinbefore referred to could not be reviewed and re-opened, and in effect holding such decisions conclusive upon the land owners in Drainage District No. 4 without said land owners being parties to said action was a denial of due process to petitioners and other land owners in said drainage district as guaranteed by Section 1, Amendment XIV of the Federal Constitution.

See Authorities cited under I, II.

V

The opinion and ruling of the Missouri Supreme Court, Division 2, is in conflict with the Federal Constitutional provisions and cases heretofore cited under Points I, II.

This is an important case. Thousands of acres of improved land in Dunklin County are affected. The petition was in 264 Counts, involving 264 different tracts of land. Drainage District No. 4 was finally organized and final judgment rendered in September, 1905, all of the contemplated improvements completed in 1912 and prior to the 1913 Amendment to the County Court Drainage District Law. The error of the County Court in failing to provide in its final judgment in September, 1905 for the payment of all of the bonds thereafter issued by the Court was discovered in 1912 and an additional assessment was procured but held invalid by the Missouri Supreme Court, Division 1, in the Redman case and which judgment in the Redman case specifically ruled that the 1913 Act could not be made retroactive and applied to the organization and proceedings of Drainage District No. 4. This decision of the Missouri Supreme Court stood from the time of its rendition in March 1917 until the decision rendered by the Missouri Supreme Court, Division 2, on April 11, 1949, a period of thirty-two

years. After the decision in the Redman case in 1917 nothing was done until the holder of the excess bonds, Murphy, in December, 1932, instituted a suit in the Federal Court on the bonds, obtained judgment in 1937, got a writ of mandamus in 1941, commanding the County Court to make the assessment sued on in that case and upon which assessment suit was brought in December, 1946. In these intervening years these lands have constantly changed hands. The property has been bought and sold, mortgages taken, all in reliance of the opinion in the Redman case as decisive of the issues and constituting a rule of property. It is admitted that the petitioners, Caneer and Sowell purchased their lands between the date of the Redman decision in 1917 and the obtaining of the judgment by Murphy in the Federal Court in April, 1937, the sustaining of this assessment will bring about many and divers actions by way of suit on covenants in warranty deeds, etc. The opinion of the Missouri Supreme Court, Division 2, shows upon its face that the assessment involved in this case against the lands in Drainage District No. 4 was proper and valid under the 1913 Act of the Missouri General Assembly when such 1913 Act had been repealed in its entirety in 1919. With due respect to the Missouri Supreme Court, Division 2, petitioners earnestly contend that rights guaranteed to them by the Federal Constitution have been violated by the opinion rendered in this case and this is a case which this Court should assume jurisdiction of in order that the rights of the many land owners in Drainage District No. 4 as guaranteed to them by the Federal Constitution may be protected and preserved.

Prayer

Wherefore, petitioners pray that a writ of certiorari be issued out of this Court directed to the Supreme Court

of Missouri, Division 2, commanding said Court to certify and send to this Court a transcript of the record in the case entitled "State ex rel W. D. McGee, for the use and benefit of Drainage District No. 4, etc., vs. Thomas Wilson, et al., No. 40898" including also the proceedings in said Court, to the end that said cause may be reviewed and determined by this Court and the judgment of the lower Court reversed.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Statement of Case

The facts with reference to the opinion below, jurisdiction of the Court and the statutes involved have been sufficiently covered in what has heretofore been stated and the Appendix attached hereto, and will not be repeated here. The issues, the pleadings and other matters necessary to the issues herein we believe have also been heretofore sufficiently discussed as not to require repetition here.

Specifications of Errors to Be Urged

The Supreme Court of Missouri, Division No. 2, erred:

1. In ruling that the final judgment of the County Court on September 27th, 1905, when Drainage District No. 4 was finally organized, did not constitute such a contract between the landowners and the purchasers of the bonds thereafter issued that could not be thereafter impaired by the subsequent legislation involved in the 1913 Act, even if the 1913 Act had not been repealed, in violation of Article I, Sec. 10 of the Federal Constitution.

2. In holding that the decision of the Missouri Supreme Court, Division No. 1, in the *Redman* case in March, 1917, was not res adjudicata and did not constitute such a rule of property in the State of Missouri that would be protected by a subsequent decision of the Court as guaranteed by Article I, Section 10, and Sec. 1, Amendment XIV, of the Federal Constitution.

3. In ruling that supplemental assessments could be made in Drainage District No. 4 without any notice to the land-

owners, denying to Petitioners the applicable ten-year statute of limitations of Missouri, and by such rulings denied to petitioners and other landowners in Drainage District No. 4 the protection guaranteed to them by the due process clause of Sec. I, Amendment XIV of the Federal Constitution.

4. In holding that the Federal Decisions hereinbefore referred to reported in 17 Fed. Supp. 128, and 119 Fed. (2d) 390, could not be reviewed and reopened and were res adjudicata against the landowners in Drainage District No. 4, who were not parties to said actions; thus denying due process of law as guaranteed by Sec. 1, Amendment XIV of Federal Constitution.

5. In sustaining the validity of the assessment made in this case in the year 1941, under the 1913 Act when said 1913 Act had been specifically repealed in its entirety in 1919, 22 years before the the assessment was made; thus denying to petitioners and other landowners in Drainage District No. 4 due process of law as guaranteed by Section 1, Amendment XIV of the Federal Constitution.

Argument

1

It is not believed necessary, and for brevity we will omit, an extensive argument in this case. What has been heretofore stated we believe clearly expresses the contentions of Petitioners in this case.

It is Petitioners' contention that Drainage District No. 4 is governed by the law of Missouri pertaining to the organization of County Court Drainage Districts as it existed on September 27th, 1905, when final judgment was rendered and the landowners discharged out of Court; that law,

together with the final judgment of the County Court of September 27th, 1905, constituted a contract between the landowners and any purchasers of the bonds thereafter issued, which contract could not be impaired by subsequent legislation without doing violence to Section 10, Article I of the Federal Constitution.

In support of Petitioners' point on that point we desire to quote from certain decisions of this Honorable Court.

In *Houston and Texas Central Railroad Company* v. *Texas*, 177 U. S. 66, l. c. 74, this Court uses the following language:

> "The claim on the part of the defendant in error, the plaintiff below, is that the state court decided the case under the provisions of the state constitution only, and without reference to the act of 1870, which the plaintiff in error (the railroad company) alleges to be an impairment of the contract set up by it in the pleadings. Although the state court held that the payments in dispute were made by means of state treasury warrants issued to circulate as money, which were therefore void as in violation of the constitution of the State, and that the delivery of the warrants by the company amounted to no payment whatever, the question still remains whether by that decision any effect was given to the act of 1870. We think the judgment of the state court did give effect to that act.

On page 77 this Court ruled as follows:

> "The Company has never accepted such a construction, but on the contrary has always opposed it, and raises the question in this proceeding at the very outset. Upon these facts this court has jurisdiction, and it is its duty to determine for itself the existence, construction and validity of the alleged contract, and also to determine whether, as construed by this court, it has been impaired by any subsequent state legislation to which effect has been given by the court below.

In *Columbia Ry.* v. *South Carolina*, 261 U. S. 236, l. c. 243 and 244, the Court uses the following language:

> "That the legislation of 1887 and 1890, and the transactions based thereon, establish a contract between the State and the defendant is clear. The remaining inquiries are: (1) What is the pertinent obligation of this contract and (2) has that obligation been impaired, in violation of Article I, Sec. 10 of the Constitution?
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> If, therefore, the judgment, although in effect impairing the obligation of the contract, nevertheless proceeds upon reasons apart from and without giving effect to the statute, this Court is without jurisdiction to review it, Bacon v. Texas, 163 U. S. 207, 216, wherein the doctrine is stated as follows:
>
> "Where the Federal question upon which the jurisdiction of this court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause in the Constitution, and so as to give this court jurisdiction on writ of error to a state court, by some subsequent statute of the State which has been upheld or effect given it by the state court."

Also, on page 235 of this Opinion the Court uses the following language:

> "Upon these facts this court has jurisdiction, and it is its duty to determine for itself the existence, construction and validity of the alleged contract, and also, to determine whether, as construed by this court, it has been impaired by any subsequent state legislation to which effect has been given by the court below.
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> • • • • • • •
>
> The record before us in the present case plainly discloses that the basis for bringing the action against the defendant was the Act of 1917."

In *Cross Lake Shooting and Fishing Club* v. *State of Louisiana*, 224 U. S. 632, l. c. 638, this Court said:

> "With this statement of the case we come to consider whether it presents any question under that clause of the Constitution which declares, 'No State shall . . . pass any . . . law impairing the obligation of contracts.' This clause, as its terms disclose, is not directed against all impairments of contract obligations, but only against such as results from a subsequent exertion of the legislative power of the State.
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> * * * * * * *
>
> But when the state court, either expressly or by necessary implication, gives effect to a subsequent law of the State whereby the obligation of the contract is alleged to be impaired, a Federal question is presented. In such a case it becomes our duty to take jurisdiction and to determine the existence and validity of the contract, what obligations arose from it, and whether they are impaired by the subsequent law."

In *Detroit United Railway* v. *People of the State of Michigan*, 242 U. S. 238, l. c. 246, this Court says:

> "In each case plaintiff in error seasonably and expressly insisted that the several township and village grants above referred to were subsisting and valid contracts when the legislature of Michigan passed the acts extending the city limits, and that those acts, if so construed or applied as to affect or modify the contracts, were in conflict with Sec. 10 of Article I of the Constitution of the United States. And it is upon the overruling of these contentions that the cases are brought here, under Sec. 237, Jud. Code."

Again at page 247 of this opinion, it is stated:

> "But in this case there were state laws passed subsequent to the making of the alleged contracts in question, in the form of the legislation of 1905 and 1907 extending the corporate limits of the city. And it is not

correct to say that the decisions of the state court turned upon the mere meaning of the contracts without reference to these subsequent laws."

At page 249 of this opinion, it is further stated:

"But, notwithstanding what was there said, it is too well settled to be open to further debate, that where this court is called upon in the exercise of its jurisdiction to decide whether state legislation impairs the obligation of a contract, we are required to determine upon our independent judgment these questions: (1) Was there a contract? (2), If so, what obligation arose from it? and (3) Has that obligation been impaired by subsequent legislation?"

In *Louisville Gas Company* v. *Citizens' Gas Company,* 115 U. S. 683, l.c. 697, this Court rules:

"Whether an alleged contract arises from State legislation, or by agreement with the agents of a State, by its authority, or by stipulations between individuals exclusively, we are obliged, upon our own judgment and independently of the adjudication of the State Court, to decide whether there exists a contract within the protection of the Constitution of the United States."

In *Terre Haute &c. Railroad Co.* v. *Indiana,* 194 U. S. 579, l.c. 585, this Court states:

"The answer also makes a general denial and invokes the Fourteenth Amendment and other relevant parts of the Constitution of the United States. The case was referred to a master, who ruled that the former judgment was not a bar, but ruled also that the company was not liable. The superior court ruled the other way and gave judgment against the company for $913,905.01. This judgment was affirmed by the Supreme Court of the State, and the case then was brought here by writ of error."

Again at pages 586 and 587 of this opinion this Court rules:

> "The Supreme Court, while agreeing that the right of the State must depend on the original charter, did give force to this later legislation, in terms, as providing a remedy, and, on the construction which we are compelled to give to the charter, did also give force in fact to the amendment to the provision attempting retrospectively to save the charter obligations after a surrender had been accepted. Therefore the question is properly here whether these statutes impaired the rights of the railroad under the Constitution of the United States. For in order to determine whether the later legislation impairs those rights, this court must decide for itself what those rights were."

Again at page 589 of this opinion, this Court uses the following language:

> "The case then stands thus: The state court has sustained a result which cannot be reached, except on what we deem a wrong construction of the charter, without relying on unconstitutional legislation. It clearly did rely upon that legislation to some extent, but exactly how far is left obscure. We are of opinion that we cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws, because the state court put forward the utenable construction more than the unconstitutional statutes in its judgment. To hold otherwise would open an easy method of avoiding the jurisdiction of this court".

Plaintiff's petition in this cause depended for cause of action upon the 1913 Act, R. 7, the answer of the defendant alleged the repeal of the 1913 Act in its entirety by the 1919 Act, R. 12, and the reply of Plaintiff admitted the repeal of the 1913 Act, R. 29. The Answer of Petitioners further alleged that even if the 1913 Act had not been repealed, that

such 1913 Act, could not be applied to Drainage District No. 4 because so to do would be subsequent legislation impairing the obligation of a contract, and retrospective in its operation in violation of Section 10, Article I of the Federal Constitution.

The opinion of the Missouri Supreme Court, Division No. 2, sustained the validity of the assessment in this case by applying the provisions of the 1913 Act, R. 83, and particularly Sections 5588 and 2 of said 1913 Act.

In the light of the admitted facts in this case Petitioners earnestly insist that rights guaranteed to them and the other landowners in Drainage District No. 4 by Article I, Section 10 of the Federal Constitution were violated and transgressed; that such opinion below is in conflict with the many opinions of this Court construing said Federal Constitutional provision, some of which Petitioners have heretofore called attention to; and Petitioners earnestly insist that on this point alone they are entitled to have the opinion and judgment of the Missouri Supreme Court, Division No. 2 reversed.

2

The opinion in the *Redman* case, 194 S. W., 260, 270 Mo. 465, was rendered by the Missouri Supreme Court, Division No. 1 on March 30th, 1917. This opinion was rendered after the passage of the 1913 Act and before its repeal in 1919. Petitioners earnestly invite the Court's attention to this entire opinion because this opinion Petitioners assert constitutes res adjudicata in this case because the assessment was made in that case against the lands in Drainage District No. 4 to pay off the identical bonds thereafter merged into the Murphy judgment in the Federal Court in April, 1937, and to the payment of which judgment, pursuant to the Writ of Mandamus hereinbefore referred to the assessment sued upon in this case was made in 1941. The parties are

the same, the subject matter the same. The real party in interest in the *Redman* case was the owner of the bonds, who would have received the collection of the assessment made in that case if it had been sustained; the defendants in that case were the lands and landowners in Drainage District No. 4.

In the case at bar Murphy has merged his bonds into judgment, but in this case he is still the real party in interest and if this assessment is sustained he will receive the collection of the assessments; and the defendants in this case are the same as in the *Redman* case, the land and landowners in Drainage District No. 4.

It will be noted from reading the opinion in the *Redman* case that the Court specifically referred to the 1913 Act and specifically ruled that it could not be retroactive and applied to Drainage District No. 4; in addition, the Court ruled in the *Redman* case that the judgment rendered by the County Court on September 27th, 1905, was a final judgment and the landowners and their lands thereafter discharged out of Court.

While we earnestly invite this Court's attention to the entire opinion we desire to call specific attention to the language of the Court in that case appearing in 194 S. W., page 263, as follows:

> "The question then arises: If it is afterward found that by this final judgment the amount is too small, is it not still a finality so far as the landowner is concerned? We think so. Both parties have had their day in court. Judgment has been rendered, and no provision in the law for a reassessment of these costs of construction. By the Act of 1913, the Legislature recognized that further authority was necessary for a reassessment, and amended the law; but that act cannot be made retroactive, and applied to this case."

Again on page 264 of the Redman opinion the Court uses the following language:

> "The right to make this subsequent assessment must be sought from the express provisions of the law under which the drainage district was organized. That law conferred no such power upon the county court, and its order of April 29, 1912, was void."

Also, we desire to call specific attention of this Court to language in the Redman opinion appearing in 194 S.W., page 263, as follows:

> "Absent a statute authorizing later action by the court (and there is none), this action of the county court was coram non judice and void. Whether equity might reach the case we do not consider this a law case."

The Missouri Supreme Court in rendering this opinion in 1917 had before it the 1913 Act which was still in full force and effect. If the Court only intended the extent of its ruling to be that the assessment could not be sustained because the assessment sued on was made in 1912 before the 1913 Act was passed, then why would the Court refer to whether or not equity might reach the case.

With due respect to the Missouri Supreme Court the ruling in the *Redman* case petitioners say went much further than the opinion below and sought to be reversed herein rules. Petitioners say it constitutes complete res adjudicata in this case and the Supreme Court erred in limiting the force and effect of the Redman decision, R. 81.

Petitioners further respectfully assert that the conduct of Murphy, the owner of the bonds clearly sustains petitioners view of the effect of the Redman decision.

Had Murphy (his Counsel), only interpreted the Redman decision to go no further than ruled by the Missouri Su-

preme Court in Division 2 in this case, then Murphy had from March 30th, 1917, to secure a further assessment which would be after the passage of the 1913 Act and before its repeal in 1919.

But it is admitted in this record that Murphy, the owner of the bonds, took no action whatsoever for a period of more than fifteen years after the rendition of the Redman decision because Murphy's first action thereafter was when he filed suit in the Federal Court on his bonds on December 30th, 1932, R. 5.

In this intervening fifteen years the lands in Drainage District No. 4 were constantly changing ownership, mortgages were being given, improvements made, all in reliance upon the Redman opinion above referred to, which Petitioners earnestly assert constituted a rule of property which could not be set aside after this period of fifteen years by a subsequent decision of the Missouri Supreme Court.

Petitioners further assert that along with the contention that the Redman opinion became a rule of property is the existence during all this period of time of the ten-year statute of limitations of Missouri as incorporated in Sec. 1013, R. S. Mo. 1939.

If the judgment of the County Court rendered on September 27, 1905, was a final judgment and the Supreme Court so ruled in the Redman case, and the pleadings of Plaintiff so admit in the case at bar, R. 31, then the landowners of the lands in Drainage District No. 4 were discharged out of Court and could not be brought back into Court except by due process of law and said landowners given an opportunity to be heard on any further assessments against their lands. Certainly the Redman opinion did rule that prior to 1913 there was no authority for a new assessment; there can be no dispute about that. If the bondholders had any right to a further assessment such right could only arise by the 1913 Act even under the

contentions of the adverse party in this case. Applying the applicable ten-year statute of limitations of Missouri, then even if such a right existed (which petitioners deny) then the cause of action in the bondholders to enforce such a right arose in 1913 upon the passage of the 1913 Act and no action being taken by the bondholders of any kind or character until December 30th, 1932, when Murphy filed suit in the Federal Court on the bonds, any such claim to a further assessment was barred and foreclosed in 1923, more than nine years before Murphy filed suit on the bonds.

Petitioners assert that the Redman opinion of itself, but when the ten-year statute of limitations of Missouri is considered along with the Redman opinion, that a rule of property was established pertaining to the lands in Drainage District No. 4 which the opinion rendered below, and sought to be reversed in this case transgresses and renders nugatory.

On this point we call attention to the fact that Petitioners raised in their answer, R. 13, and in the brief filed in the Missouri Supreme Court, the question of the ten-year statute of limitations; the Supreme Court did not pass on the ten-year statute of limitations raised by petitioners, but incorporated in the opinion rendered a rule on the five-year statute of limitations of Missouri which petitioners did not raise nor present in the brief filed in the Supreme Court of Missouri.

In *Louisiana* v. *Pilsbury*, 105 U. S. 278, l.c. 294, this Court uses the following language:

> "The exposition given by the highest tribunal of the State must be taken as correct so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies to the construction of a provision of the organic

law, as to the construction of a statute. The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it.

* * * * * * *

The statute as thus expounded determines the validity of all contracts under it. A subsequent change in its interpretation can affect only subsequent contracts."

In *Douglass* v. *County of Pike,* 101 U. S. 677, l.c. 685, this Court uses the following language:

"From that time forward, and until long after the issue of the bonds now in question, the law was treated by the courts and the people as valid and constitutional. No lawyer asked for a professional opinion on that subject could have hesitated to say that it had been settled."

Also, at page 687, of this opinion this Court states:

"The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of legislative enactment."

In *Muhlker* v. *Harlem Railroad Company,* 197 U. S. 544, l.c. 562, this Court states:

"We do not, therefore, solve the questions in this case by reference to the power of the State and the duty of the railroads; the rights of abutting property owners must be considered, and against their in-

fringement plaintiff urges the contract clause of the Constitution of the United States and the Fourteenth Amendment."

Also, at page 570 of this opinion this Court uses the following language:

> "However, we need not go farther than the present case demands. When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.
>
> And this is the ground of our decision. We are not called upon to discuss the power or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it."

Petitioners respectfully submit that the opinion rendered by the Missouri Supreme Court, Division No. 2, was in error in failing to rule that the Redman case constituted res adjudicata; that said opinion further erred in failing to recognize and declare the decision in the Redman case to constitute a rule of property affecting all lands in Drainage District No. 4, and that such opinion violated and transgressed rights guaranteed to petitioners and other landowners in Drainage District No. 4 by the provisions of Article I, Section 10, and Section 1, Amendment XIV of the Federal Constitution.

3

In the Appendix attached hereto, we have called attention to Section 5588 of the 1913 Act, one of the sections cited by the Missouri Supreme Court, Division 2, in the opinion below. It will be noted that the section referred to purports to authorize additional assessments without notice.

It is admitted in this case that from September 27th, 1905, when the final judgment of the County Court was rendered that the landowners in Drainage District No. 4 were not thereafter brought back into Court until in December, 1946, when the suit on the assessments involved here was filed, a lapse of forty-one years. Petitioners contend that under the facts of this case they were entitled to notice of some kind and be given their day in Court before the assessment was made in 1941, and sued on in this case in 1946. To levy this assessment without notice to them constituted a denial of due process as provided in Section 1, Amendment XIV of the Federal Constitution.

4

It stands conceded that the landowners in Drainage District No. 4 were not parties in the two proceedings in the Federal Court hereinbefore referred to, opinions in said cases being reported in 17 Fed. Supp. 128, and 119 Fed. (2d) 390. As heretofore shown the first case was when Murphy obtained judgment on his bonds and the last case the mandamus brought in the Federal Court to compel the County Court of Dunklin County, Missouri, to levy the assessment sued on in this case to pay the Murphy judgment.

The gist of the opinion of the Missouri Supreme Court, Division No. 2, is that these Federal cases could not be reopened and reviewed and that they were binding and conclusive upon the landowners, R. 85. Petitioners assert that

such ruling foreclosed them and all other landowners in Drainage District No. 4 in actions to which they were not parties, had no day in Court and amounts to a denial to them of due process as guaranteed by Section 1, Amendment XIV of the Federal Constitution.

In the two Federal actions the parties were Drainage District No. 4 as a municipal corporation, the Judges of the County Court as the constituted Board of Directors of Drainage District No. 4 and Dunklin County. We have heretofore called attention that this is a suit against the landowners in Drainage District No. 4. The parties to the action are not the same, and Petitioners respectfully assert the Missouri Supreme Court, Division No. 2 erred in the conclusion reached relative to the scope and effect of the Federal decisions above referred to.

Petitioners further respectfully assert that such ruling conflicts with the Federal decisions themselves wherein it is apparent from the clear language of the opinion in the Federal cases, that the Federal Court was not passing upon the rights of the landowners.

In support of our position on that point we desire to quote from *Murphy* v. *Dunklin County et al.*, 17 Fed. Supp., l. c. 132 and 133 as follows:

> "No mention has been made of a consideration that is entitled to great weight. This action against the county, the maker of the instruments sued upon, *cannot fail because the means of satisfying the judgment may not be available. The remedy exists though satisfaction may be denied.*"

In *Drainage District No. 4, et al.* v. *Murphy*, 119 Fed. (2) l. c. 394, the Court uses the following language:

> "In what we have determined and stated above under the issue of laches and limitations, we have borne in mind the particular parties defendant—the County

of Dunklin, the Drainage District and the members of the County Court—which are identical in the Murphy action at law and in this mandamus proceeding. *As to whether or as to what extent the landowners are bound is not before us and is neither determined nor examined.* All that we determined now is that the action of the Court in issuing the mandamus order here involved is not open to any of the errors here urged and, therefore, that the order is affirmed."

Petitioners say that a reading of the two Federal opinions clearly show that it was not the intention of either of the Federal Courts to make the ruling in those cases binding or conclusive upon the landowners in Drainage District No. 4 and the Missouri Supreme Court, Division No. 2, erred in so ruling.

5

The assessment sued on in this case was made in 1941, and the suit brought in 1946. The pleadings as we have heretofore shown admit that the 1913 Act was repealed in its entirety by the act of the General Assembly of Missouri in 1919.

In the Appendix attached hereto, we have set out the title of the 1919 Act expressly repealing the 1913 Act. The opinion below sustained the assessment made by the provisions of the 1913 Act which has not been the law of the State of Missouri since 1919, the 1913 Act having been repealed twenty-two years before the assessment was made in this case in 1941.

Petitioners assert that when a law is repealed in its entirety it can only be revised or reinstated by action of the Legislative Body of the State of Missouri, and no Court without such legislative action, can breathe life into, or reinstate a dead law. But with due respect to the Missouri Supreme Court, Division No. 2, that was what was done in

this case; and it was done in the face of the admissions and the pleadings as we have heretofore called attention to that the 1913 Act had been repealed in 1919.

Petitioners assert that the sustaining of the assessment against them in this case under a repealed law of the state amounted to a denial of due process as guaranteed by Section 1, Amendment XIV of the Federal Constitution.

The brief of Petitioners, as Respondents in the Missouri Supreme Court, Division No. 2, cited Sections 15 and 30, Article II of the Missouri Constitution, same being the constitutional provision in Missouri prohibiting impairment of contract obligations or laws that would be retrospective in their operation, and the due process clause of the Missouri Constitution.

In the Appendix attached hereto we have shown that the language of these two Missouri constitutional provisions are identical with the language of Article I, Section 10 and Section 1, Amendment XIV of the Federal Constitution.

It will be noted that in the Motion for Rehearing filed by Petitioners in the Missouri Supreme Court, R. 86, the ruling of the Missouri Supreme Court, Division 2, was not again challenged as to matters that the Missouri Supreme Court had passed upon in the opinion filed, and which included overruling Respondent's contentions as to the constitutional provisions.

Petitioners could not reargue any matter that had been passed upon by the Court in the opinion filed because of rule 1.19 of the Rules of the Supreme Court of Missouri which we have set out herein at the close of the Appendix attached.

To the Motion for Rehearing filed by Petitioners in the Missouri Supreme Court, Division No. 2, in accordance with the above rule, suggestions were filed and these suggestions appear in the record in this Court at page 92.

In order not to repeat the argument made in these suggestions here we refer the Court to those suggestions as they appear in the Record.

Petitioners have tried to make this Application as concise as possible in order to get before this Court the issues involved, but realize that it is somewhat lengthy, but in mitigation of the length of same the journey of this case through the Supreme Court of Missouri twice and in the Federal Courts twice has involved a record that could hardly have been shortened without failing to get before this Court Respondent's contentions.

Conclusion

Petitioners are mindful that the Writ applied for in this case is a discretionary Writ and that its issuance rests in the sound discretion and conscience of this Court. But Petitioners earnestly assert with due and proper respect to the Missouri Supreme Court, Division No. 2, that this is a case where the opinion below if sustained by this Court will perpetuate and manifest injustice upon hundreds of landowners, of thousands of acres of lands in Dunklin County, Missouri; it will disturb a rule of property established as far back as 1917 by the decision of the Missouri Supreme Court, Division 1, in the *Redman* case; it will require purchasers of this property who have bought the lands since the improvements were completed in 1912 and who paid for the improvements at the time of their purchase, to again pay for a portion of these improvements; it will disturb titles that have been passed upon by lawyers from the date of the Redman decision in 1917, down to date, the legal profession relying not only upon the Redman decision but upon the ten-year statute of limitations of Missouri which has been in force during all these years; it will bring about numerous suits on covenants of warranty deeds made

by former owners of this land to present owners; it will disturb a rule of property which every lawyer practicing in this locality has believed established by the Redman decision in 1917.

Petitioners earnestly assert that this Court should assume jurisdiction of this cause and reverse the opinion and judgment rendered by the Missouri Supreme Court, Division No. 2; and for such relief your Petitioners respectfully pray.

BON GEASLIN,
1740 G St. N. W.,
Washington, D. C.;
LANGDON R. JONES,
Kennett, Missouri.

Relative to Jurisdiction of This Court

Subsequent to presentation of petitioners' brief in support of their petition for writ of certiorari, petitioners desire to anticipate a contention that the petitioners did not raise a Federal question in the State Court. Petitioners feel sure that that question will have to be met and desire to request the indulgence of this Court to meet that question now.

It so happens that the due process clause of the Federal Constitution as contained in Section 1, Amendment XIV is identically the same as the due process clause of the Missouri Constitution as contained in Art. II, Sec. 30; and that the Federal constitutional provision relative to prohibiting subsequent legislation that would impair the obligation of a contract or would be retrospective in their operation, as defined in Art. I, Sec. 10, is almost identically like the Missouri constitution as contained in Art. II, Sec. 15. Petitioners have in the Appendix attached, set forth the provi-

sions of the Federal constitution and the Missouri constitution for the Court's convenience in comparing these constitutional provisions. As heretofore called attention to, the action filed by plaintiff against petitioners sought to sustain the validity of the assessment made in this case under the provisions of an act of the Legislature of Missouri in the year 1913, R. 7; the answer of petitioners pleaded that Drainage District No. 4 was finally organized and final judgment rendered on September 27, 1905, under the County Court Drainage District Law of Missouri as it then existed and that all improvements contemplated by the drainage district had been completed prior to the passage of the 1913 Act, R. 14; the answer of the petitioners then pleaded the repeal of the 1913 Act by the 1919 Act, R. 12; and further pleaded that even if the 1913 Act were still in existence it could not be applicable to the proceedings in Drainage District No. 4 because it would violate Sections 15 and 30, Article II, Missouri Constitution, R. 11, 12; said answer also pleaded that the 1913 Act, if sought to be applied to Drainage District No. 4 would violate Amendment V of the Federal Constitution, R. 17, 23, and Sec. 1, Amendment XIV and Sec. 10, Art. I of the Constitution of the United States, R. 17, 23.

In the trial of the case the plaintiff offered in evidence the 1913 Act, R. 52, and it will be noted that petitioners objected to the offering of the 1913 Act and in said objection specifically raised the question that such legislation impaired the obligation of a contract and was retrospective in its operation if applied to Drainage District No. 4 prohibited by Art. II, Sec. 15, Missouri Constitution, R. 52, and in addition the objection was made that said 1913 Act would deprive the land owners in Drainage District No. 4 of their property without due process of law, R. 53, this objection was made at a time when the answer contained a

plea that to give effect to the 1913 Amendment would deprive the land owners in Drainage District No. 4 of their property without due process of law as prohibited by Sec. 1, Amendment XIV of the Federal Constitution; and also as prohibited by Art. II, Sec. 30 of the Missouri Constitution.

The trial Court rendered judgment in favor of petitioners, R. 62 to 68. It will be noted that in the judgment of the trial Court, the trial Court ruled that the 1913 Act was unconstitutional and void in that it violated the due process clause of the State Constitution and also violated the clause of the State Constitution relative to retroactive legislation, R. 67, 68. It is true the trial Court in its judgment made no reference to any clauses of the Federal Constitution but did rule the 1913 Act violative of both Sections 15 and 30, Article II of the Missouri Constitution, which, as we have heretofore shown are almost identical with Art. I, Sec. 10 and Sec. 1, Amendment XIV of the Federal Constitution. On appeal of the plaintiff in the action against petitioners, the brief of petitioners filed in the Supreme Court of Missouri attempted to sustain the judgment of the trial Court and did not, in their brief, specifically cite the Federal Constitutional provisions above referred to, but did cite in their brief both Sections 15 and 30 of Article II, of the Missouri Constitution, cited authorities thereunder, and presented the argument in the Supreme Court of Missouri that even if the 1913 Act had not been repealed, it could not be applicable to Drainage District No. 4 because in violation of both Sections 15 and 30, Article II of the Missouri Constitution.

So, petitioners respectfully contend that the *question* of due process and the *question* of the 1913 Act impairing the obligation of a contract and being retrospective in operation if sought to be applied to Drainage District No. 4 was raised and determined in the opinion of the Missouri

Supreme Court, Division 2. As petitioners understand the rule, this Court will entertain jurisdiction where a Federal question was raised; the due process clause incorporated in the Federal Constitution and the Federal constitutional provision prohibiting subsequent legislation that would impair the obligation of a contract or be retrospective in operation, petitioners contend were raised and were necessarily decided by the Missouri Supreme Court when the Missouri Supreme Court ruled, as its opinion shows, that the 1913 Act did not violate Sections 15 and 30 of Article II of the Missouri Constitution.

Where the questions to invoke the jurisdiction of this Court were raised and certainly they were raised, specifically named in the answer of petitioners, then it would be extremely technical construction to say that while the questions involved in the provisions in the Federal Constitution were aptly raised throughout the case, yet because such questions were not raised in the brief filed in the Supreme Court by specific reference to the Federal constitutional provisions that this Court could not assume jurisdiction; this is especially true in the case before the Court, which petitioners say, with due respect to the Missouri Supreme Court, is an injustice and fastens a lien upon the lands in Drainage District No. 4 without due process of law.

Petitioners concede that in their motion for rehearing and in the alternative to transfer to Court En Banc they did not re-argue the adverse ruling as to constitutionality of the 1913 Act; this was in deference to the rule in the Supreme Court that on motions for rehearing questions passed upon by the Court in the opinion filed, cannot be re-argued and will be ignored, the contents of the motion for rehearing being limited as provided by the applicable rule of the Supreme Court which we have set out at the end of the Appendix attached hereto.

The position taken by petitioners on this question of jurisdiction has been approved by numerous decisions of this Honorable Court, to some of which decisions we now address ourselves.

In *Spencer* v. *Merchant*, 125 U. S. 345, this Court had before it a case to quash the opinion of the Supreme Court of New York. In this case, as shown in the opinion, pages 349 and 350, the plaintiff who sued out the writ of error, simply asserted that a New York Act of 1881 was unconstitutional and void. This Court, 125 U. S. l. c. 352, uses the following language:

> "The question submitted to the Supreme Court of the State was whether this assessment on the plaintiff's lot was valid. He contended that the statute of 1881 was unconstitutional and void, because it was an attempt by the legislature to validate a void assessment, without giving the owners of the lands assessed an opportunity to be heard upon the whole amount of the assessment. *He thus directly, and in apt words, presented the question whether he had been unconstitutionally deprived of his property without due process of law, in violation of the first section of the Fourteenth Amendment to the Constitution of the United States, as well as of art. 1, sec. 7, of the Constitution of New York; and no specific mention of either constitutional provision was necessary in order to entitle 'him to a decision of the question by any court having jurisdiction to determine it. The adverse judgment of the Supreme Court, affirmed by the Court of Appeals of the State, necessarily involved a decision against a right claimed under the Fourteenth Amendment to the Constitution of the United States, which this court has jurisdiction to review.*"

In *Murray* v. *Charleston*, 96 U. S. 432, writ of error was sued out against the Supreme Court of South Carolina. In that case, Murray appealed to the Supreme Court and his

notice of appeal as shown on page 434 of the opinion, simply stated that the levy of said tax impaired the obligation of a contract and was, therefore, unconstitutional and void. There was no reference in this assignment of error to any specific provisions of the Federal or State Constitution of South Carolina. At page 440, this Court uses the following language:

> "It is objected that we have no jurisdiction of the case, because, it is said, no Federal question was raised of record, or decided in the Court of Common Pleas, where the suit was commenced • • •

At page 441 the Court uses this language:

> "The jurisdiction of this court over the judgments of the highest courts of the States is not to be avoided by the mere absence of express reference to some provision of the Federal Constitution.
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> • • • • • • •
>
> The act of Congress of 1867 gives jurisdiction to this court over final judgments in the highest court of a State in suits 'where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity.' Not a word is said respecting the mode in which it shall be made to appear that such a question was presented for decision. In the present case, it was necessarily involved, without any formal reference to any cause in the Constitution, etc".

In *Chicago Life Insurance Company* v. *Needles*, 113 U. S. 574, this Court had before it a writ of error to the Supreme Court of Illinois. This Court, at page 579 of the opinion, uses the following language:

> "The Supreme Court of Illinois did not, in terms, pass upon the claim distinctly made there, as in the

court of original jurisdiction, that the statutes in question were in derogation of rights and privileges secured to appellant by the Constitution of the United States. But the final judgment necessarily involved an adjudication of that claim; for, if the statutes upon the authority of which alone the auditor of state proceeded, are repugnant to the National Constitution, that judgment could not properly have been rendered. This Court, therefore, has jurisdiction to inquire whether any right or privilege protected by the Constitution of the United States, has been withheld or denied by the judgment below. And our jurisdiction is not defeated, because it may appear, upon examination of this Federal question, that the statutes of Illinois are not repugnant to the provisions of that instrument. Such an examination itself involves the exercise of jurisdiction. The motion to dismiss the writ of error upon the ground that the record does not raise any question of a federal nature must, therefore, be denied."

In *Hagar* v. *Reclamation District No. 108*, 111 U. S. 701, this Court had before it an opinion of the Supreme Court of California. At page 707 of this opinion, the Court uses the following language:

"That clause of the Fourteenth Amendment is found, in almost identical language, in the several State Constitutions, and is intended as additional security against the arbitrary deprivation of life and liberty and the arbitrary spoliation of property. Neither can be taken without due process of law."

This opinion at page 711 uses the following language:

"The assessment under consideration could, by the law of California, be enforced only by legal proceedings, and in them any defence going either to its validity or amount could be pleaded. In ordinary taxation assessments, if not altered by a board of revision or of equalization, stand good, and the tax levied may be collected by a sale of the delinquent's property; but assessments

in California, for the purpose of reclaiming overflowed and swamp lands, can be enforced only by suits, and of course, to their validity it is essential that notice be given to the tax-payer and opportunity be afforded him to be heard respecting the assessment. In them he may set forth, by way of defence, all his grievances."

Petitioners respectfully submit that they have raised and kept alive the due process clause of the Federal Constitution as well as the Federal Constitutional prohibition against retrospective legislation that would impair the obligation of a contract. Since the language relative to these matters in both the Federal and Missouri State constitutional provisions are identical, when the Missouri Supreme Court, Division 2, ruled against petitioners on the constitutional provisions incorporated in Sections 15 and 30, Article II, the effect of such decision was to deny to petitioners due process as incorporated in Section 1, Amendment XIV of the Federal Constitution and also to deny to petitioners the protection of Section 10, Article I of the Federal Constitution.

Petitioners further respectfully represent that the decisions of this Honorable Court heretofore referred to sustain petitioners on this question and petitioners earnestly assert that this Court has and should assume jurisdiction of this cause.

APPENDIX

Comparison Federal and Missouri State Constitutional Provisions.

Amendment V Federal Const. provides "Nor shall any person be * * * deprived of life, liberty or property, without due process of law."

Sec. 1. Amendment XIV Federal Const. provides:

* * * nor shall any State deprive any person of life, liberty or property without due process of law".

Sec. 30, Art. II Missouri Const. 1875 (Sec. 10, Art. I Mo. Const. 1945) "That no person shall be deprived of life, liberty or property without due process of law".

Sec. 10, Art. I Federal Const. provides, "No State shall * * * pass * * * any law impairing the obligation of contracts".

Sec. 15, Art. II, Missouri Const. 1875 (Sec. 13, Art. I, Mo. Const. 1945) provides, "That no * * * law impairing the obligation of contracts * * * can be passed by the General Assembly".

Applicable Provisions of County Court Drainage District Law Under Which Drainage District No. 4 Was Organized

The following provisions of Missouri State Law applicable to the organization of County Court Drainage Districts, and which were considered by the Missouri State Supreme Court in the case of

State ex rel Douglass v. *Redman,* 194 S. W. 260, 270 Mo., 465.

The references are to the Sections appearing in Laws of Missouri, 1905, pages 182 to 189, and to the same sections as carried forward in the 1909 revision of the Missouri State Statutes.

"Section 8284 (Section 5584, R. S. Mo., 1909):

If the county court shall find that the proposed ditch or other improvement is necessary for sanitary or agricultural purposes, or would be of public utility or conducive to the

public health, convenience or welfare, it shall cause to be entered upon the record of the court, such finding, and an order appointing the formerly appointed, or another competent civil engineer, and three viewers, one, two, all or none of whom, may, in the discretion of the court, have served as such in making the preliminary survey and report, who shall possess the qualifications and, before entering upon the discharge of their duties, shall take the oath prescribed by section 8280, and directing them to go upon the line described in the order, and if only the general route has been located, to establish the precise location thereof, where in their judgment the proposed improvement will prove most efficient to survey and level such described or by them established line, and set a stake at every one hundred feet, numbering down stream, mark the intersections and boundaries of lands, township, range and county lines, benchmarks and road and railroad crossings; to determine the dimensions and form of the proposed ditch, levee or other improvement and what disposition shall be made of excavated earth; to estimate the number of cubic yards of earth or other substance to be removed and the cost per cubic yard for each section of one hundred feet, and for the whole work, and to make a report, profile and plat of the same. They shall also make and return a schedule of all lots and lands and of public and corporate roads or railroads that will be benefited, damaged or condemned by or for the improvement, and the damage or benefit to each tract of forty acres or less, and make separate estimates of the cost of location and construction, and apportion the same to each tract in proportion to the benefits or damages that may result to each. If so ordered by the court, they shall also apportion and allot the construction of the number of lineal feet and cubic yards of said work to each lot or tract of land, road or railroad, in proportion to the estimate of benefits or damages as above described. They shall specify the manner and time in which the improvement shall be made, and completed, the number of flood-gates, water-ways, crossings, bridges and dimensions thereof, and note the county and township lines and railroad crossings. The plat shall be drawn upon a scale sufficiently large to represent

all the meanderings of said improvement, and shall distinctly show the boundary lines of each lot or tract of land, and each road or railroad to be benefited thereby, the name of the owner or owners of each tract of land and of any interest therein, so far as they are, by diligent effort, able to ascertain the same, the authority or company having in charge, owning or controlling each public or corporate road or railroad, the distance in feet through each tract or parcel of land, together with such other matters as the viewers or engineer may deem material. Such profile shall show the surface, the grade line and grade, if any fixed, and the viewers and the engineer shall make and file with the report an itemized bill of costs made in the proper discharge of their duties, and shall file their report with the clerk of the court within thirty days after making said survey and levels. If any engineer or viewer shall die, or fail or refuse to qualify and serve as such, the county court may appoint some other person having the prescribed qualifications, who shall, before entering upon the discharge of his duties, take, the oath prescribed by section 8280."

"Section 8286. (Section 5586 R. S. Mo. 1929):

The viewers shall have the power to condemn the right of way for the ditch or other improvement; and when damages are allowed persons, their benefits, if benefited, shall be taken into consideration, and their assessment for benefits shall be reduced by the amount of their damages; and if not benefited they shall be allowed and paid compensation for their damages".

"Section 8287. (Section 5587, R. S., Mo. 1909):

Upon the filing of the report of the viewers, the county clerk shall immediately set the hearing of the same for some day of the next regular term of the county court. He shall thereupon issue, in the name of the state, a notice, directed, by name, to every person returned by the engineer and viewers as the owner of every lot or parcel of land affected by the proposed improvement or of any interest therein, and also by name, to all others, whom it may in any manner be ascertained own such land, or any part thereof, or any interest therein, and also generally

to all other persons, without mentioning their names, who may own such land, or any part thereof, or any interest therein, notifying them of the general object and nature of the petition and report of the engineer and viewers, and that, on the day so fixed, the county court will hear said petition and report, and any evidence that may be adduced concerning the same, and requiring them, on the day fixed for the hearing to appear before the county court and show cause, if any they have, why said report should not be confirmed, as made or as the same may by the county court be amended, and the improvements and assessments, therein described or as the report may be amended, made. Such notice shall contain in appropriate columns, a tabulated description, which may be abbreviated as land descriptions are usually abbreviated, of every lot or parcel of land that will be affected by the proposed improvement, and shall be published in four issues of some weekly newspaper published in the county, the last insertion to be before the day set for the hearing.

Section 8288, (Sec. 5588, R. S. Mo., 1909):

"The Court shall first determine whether the required notice has been given. If it finds that due notice has not been given it shall continue the hearing to a day to be fixed by the court, and cause the notice to be given as provided in section 8287; and when the court finds that due notice has been given, it shall examine the report of the engineer and viewers, and if it appears to the court that the estimates of the cost of location and construction of damages and benefits to each tract are correct, and that the apportionment of the cost of location and construction is, in proportion to the benefits and damages to each tract, in all things fair and just, it shall approve and confirm the same; if, however, the county court shall find that the apportionment reported by the engineer and viewers are unfair or unjust, and, as made, ought not to be confirmed, it may, by an order of record, amend the report upon the evidence so as to make the apportionments fair and just in proportion to the benefits or damages; if the county court shall find that the

location or specification of the ditch or other improvement should be changed it may by an order of record change such location and dimensions, provided, that, before the county court shall change the location reported by the viewers, the parties interested shall convey or cause to be conveyed to the drainage district, a right of way for the ditch or other improvement upon the route selected by the county court.

Section 8292, (Sec. 5592, R. S. Mo., 1909):

"Any person whose lands are affected by the proposed improvements may, on or before the day set for the hearing by the court, file exceptions to the apportionments made by, and to the action of, the viewers upon any claim for compensation or damages. The county court may hear testimony and examine witnesses upon all questions made by such exceptions, and for that purpose may compel the attendance of persons as witnesses and the production of other evidence, and its decision upon each of the exceptions shall be entered of record; if the exceptions be sustained the cost of hearing the same shall be paid as other location expenses are paid, and, if the same be overruled, such cost shall be taxed against the person filing the exceptions. Any person may appeal from the order of the court, and upon such appeal, there may be determined either or both of the following questions: First, whether compensation has been allowed for property appropriated, and second, whether proper damages have been allowed for property prejudicially affected by the improvements, the county court shall grant the appeal if the appellant shall, before the end of the term of the county court and within ten days from the date of the order appealed from, file a written application for an appeal, specifying therein the matters appealed from, verified by affidavit as in appeals taken from judgments of circuit courts, and the applications shall be recorded upon the record of the county court. The county Court shall then fix the amount of the bond to be given by the appellant and cause an entry thereof to be made upon its record. The party appealing shall, within ten days thereafter file with the clerk a bond payable to the State of Missouri, in the amount fixed by the

county court, with at least two good and sufficient freehold sureties, to be approved by the court, or in vacation, the clerk, conditioned to pay all costs on the appeal, in case the appellant fail to sustain the same, or the appeal be for any reason dismissed; and the said clerk shall make and certify a transcript of the proceedings had before the county court relating to the land of appellant and involved in the appeal, and file the same, together with all original papers relating to the proceedings, on file in his office, in the office of the clerk of the circuit court, within thirty days from the date of filing said bond; provided, that nothing in this section shall be so construed as to authorize any appellant to stay the proceedings in the county court, or to prevent progress in the work of constructing such public ditches, drains or water-courses, or other work or improvement; but said county court may proceed with said work, and any subsequent proceedings in the circuit Court shall affect only the rights and interest of the appellant in property located in such drainage district."

"Section 8298, (Section 5598 R. S. Mo., 1909):

The assessment as made by the viewers and confirmed by the court, against all lots and parcels of land, and all public or corporate roads and railroads, benefited by the ditch or other improvement, and interest on the amount of all such assessments, at a rate, not exceeding six per cent. per annum, to be fixed by the county court at the time of its confirmation of the report of the engineer and viewers, or within three months thereafter, together with all costs of collecting delinquent assessments or any installments thereof, including a reasonable attorney's fee, to be fixed by the court and taxed as costs in the action brought to enforce a delinquent assessment or installment thereof, shall from the date of such confirmation of the report of the engineer and viewers, until paid, constitute a lien, to which only the lien of the state for state, county, school and road taxes shall be paramount, upon all of the lands assessed, and shall be collected, in the same manner as state, county and school taxes upon real estate are collected, and when collected the said tax

shall be by the collector paid over to the county treasurer monthly. The said tax shall become delinquent if not paid on or before the thirty-first day of December of each year, and when so delinquent shall bear interest at the rate of one per cent per month until paid, and the collector shall bring suit for all delinquent assessments or installments thereof, and interest thereon within six months after an assessment or installment thereof becomes delinquent. The title acquired through any sale of lands under a judgment for a delinquent assessment, or installment thereof, shall be subject to the lien of all said installments and said interest and costs then unpaid. All costs except of construction and collection of delinquent assessments or installments, and except those taxable to the petitioners, remonstrators or appellants, shall be paid out of the county treasury, and be refunded to the county out of the first money received upon assessments, or from sales of bonds, issued under the provisions of this article. After such costs are refunded, such damages, if any, as have been paid to land owners and others by the county shall be next refunded to the county."

Section 8299, (Section 5600, R. S. Mo., 1909):

"The liens established and declared in the preceding section may be enforced by an action on delinquent tax bill, made and certified by the collector, instituted in the circuit court, without regard to the amount of the claim, and the pleadings, process, proceedings and practice in cases arising under this article shall, except as herein provided, be the same as in actions for the enforcement of the state's lien for delinquent state, county and school taxes upon real estate. All sheriff's deeds executed and delivered pursuant to this article shall have the same probative force as sheriff's deeds executed under judgment for delinquent state, county and school taxes upon real estate, and inactions instituted under this article the same abbreviations shall be allowed, and the delinquent ditch tax bill shall have the same probative effect as the back tax bill has in actions for the enforcement of the state's lien for state, county and school taxes upon real estate."

Section 8301, (Section 5602) R. S. Mo., 1909:

"The said assessments, after the confirmation by the county court as herein provided, together with the interest thereon, as so fixed by the court, shall be entered, by the county clerk, in a special book, to be known as the ditch assessment book, which shall be provided by him at the expense of the county, and annually thereafter, until such assessment and the interest thereon shall be fully paid, the county clerk shall enter, opposite each tract of land, upon a ditch tax book, in columns to be provided for that purpose, the amount of the installment of such assessments for such year, and the interest for such year on all unpaid installments not past due, as fixed by the county court as herein provided; the said installments of said assessments and the interest thereon shall be applied to the payment of the bonds, principal and interest, issued pursuant to this article, and, except as herein provided, to no other purpose, and the payment of such bonds shall be thus secured."

Section 8301a (Section 5603), R. S. Mo., 1909:

"The county court may, if prayed for in the petition, issue bonds in denominations of not less than one hundred dollars, and sell the same to meet the expenses of locating and constructing any ditch or improvement under the provisions of this article, which bonds shall mature, at annual intervals, commencing after a period of two years, for not exceeding twenty years, bear interest at not to exceed six per cent per annum and be payable semi-annually at the office of the county treasurer. Such bonds shall be sold by the county treasurer, without expense to the county, to the highest and best bidder, after the county court shall have fixed the time and place of such sale, and given notice thereof, by publication, in some weekly newspaper published in the county, but in no case shall any such bond be sold for less than par: Provided, such bonds shall show upon their face the purpose for which they are issued and shall be payable out of moneys derived from such assessments and none other."

1913 Amendment to County Court Drainage District Law

In 1913 the Missouri General Assembly amended the County Court Drainage District Law. In the opinion of the Missouri Supreme Court the assessment in this case was sustained under authority of the 1913 Act, and in the opinion of the Missouri Supreme Court specific reference is made to Sections 5588, appearing in 1913 Laws of Missouri at page 274 and Section 2 of said 1913 Amendment appearing in 1913 Laws of Missouri at page 281. The 1913 Act went into effect March 27th, 1913.

The pertinent part of Section 5588 of the 1913 Amendment is as follows:

> "And if it be found at any time by the county court that such apportionment or tax assessment made by the county clerk shall be insufficient, the county court shall direct the clerk to make a further tax assessment, proportioned on the original assessment of benefits, without notice, on the lands benefited, to be collected in the same manner as the original tax assessment."

This section is referred to in the opinion as it appears in R. 83.

Section 2 referred to in the opinion of the Missouri Supreme Court will not be reproduced because the pertinent parts thereof considered by the Court appears in the opinion as shown in R. 83.

In 1912 application was made by the bondholders of Drainage District No. 4 to the County Court of Dunklin County, Missouri, for an additional assessment to pay off the identical bonds that are in question here. This assessment was resisted by the landowners in Drainage District No. 4 resulting in the opinion of the Missouri Supreme Court in the case of State ex rel. Douglass *vs.* Redman, reported in 270 Mo. 465, 194 S. W. 260.

This opinion was rendered on March 30th, 1917, and while the 1913 Act of Missouri was still in force. This opinion in the Redman case discusses the law pertaining to County

Court Drainage Districts as it existed in 1905 when Drainage District No. 4 was organized and final judgment rendered therein September 27th, 1905; this opinion also discusses the 1913 Amendment above referred to, and specifically rules that the 1913 Amendment could not be applicable to the proceedings in Drainage District No. 4 wherein final judgment was rendered on September 27th, 1905.

We earnestly refer this Court to that opinion.

Repeal of the 1913 Act

In 1919 the General Assembly of Missouri repealed the 1913 Act above referred to in its entirety, and enacted an entirely new County Court Drainage District Law. Laws of Missouri 1919, Page 294.

The pertinent provisions of the 1919 title repealing the 1913 Law in its entirety are as follows:

> "An Act to repeal Article IV of chapter 41 of the Revised Statutes of Missouri, 1909, entitled 'Construction and improvement of ditches, water courses and levees upon petition of one or more landowners,' and to repeal an act of the forty-seventh general assembly entitled: 'An act to repeal sections 5580, 5583, 5584, 5586, 5588, 5595, 5596, 5603, 5605, 5608, 5614, 5618, 5634 and 5635 of article 4, chapter 41 of the Revised Statute of Missouri, 1909, relating to the construction and improvement of ditches, water courses and levees upon the petition of one or more landowners' and to enact new sections in lieu thereof and in addition thereto, to be known as follows: 5580, 5583, 5584, 5586, 5588, 5588a, 5595, 5596, 5603, 5605, 5608, 5611a, 5611b, 5614, 5618 and 5619a, with an emergency clause, * * * and to enact a new article in lieu thereof, to be known as Article IV of Chapter 41, relating to the same subject matter, and repealing conflicting acts and parts of acts".

After the opinion in the Redman case above referred to, nothing was done by the bondholders until in December, 1932, the owner of the bonds, Joseph D. Murphy, filed a

suit in the Federal Court praying judgment on the bonds, and being the same bonds to the payment of which the levy was made in this case. The landowners were not made parties to this action.

In 1937 judgment was rendered in favor of Murphy and against the defendants in that case and the opinion of United States District Court will be found in 17 Fed. Supp. 128.

This case was not appealed and thereafter mandamus proceedings were instituted by Murphy against the County Court of Dunklin County, Missouri, asking that the County Court be directed to levy an assessment against the lands in Drainage District No. 4 to pay off and discharge the Murphy judgment. The landowners in Drainage District No. 4 were not a party to this action. Writ of Mandamus issued from United States District Court and this case was appealed resulting in the opinion reported in Drainage District No. 4 *vs.* Murphy, 119 Fed. (2d) 390.

In 1941 the County Court of Dunklin County by direction of the Writ of Mandamus made the assessment against the lands in Drainage District No. 4 which is involved in this case.

In December, 1946, suit was instituted on the assessment against all the landowners in Drainage District No. 4 and the counts of the petition affecting the lands of the petitioners herein, Caneer, and Sowell, were tried with a Stipulation that the judgment rendered on those two counts would be entered against the landowners involved in the other counts of the petition.

The Circuit Court of Dunklin County, Missouri, rendered judgment in favor of the Defendants, Caneer and Sowell, and following the Stipulation rendered judgment in favor of all of the Defendants in the case.

On appeal to the Missouri State Supreme Court the Missouri State Supreme Court reversed and remanded the cause with instructions to render judgment in favor of the Appellant on all counts of the petition, and this opinion as before stated sustained the assessment sued upon on the authority of the 1913 Amendment to the County Court Drainage District law which was specifically repealed in its entirety in the year 1919.

After unsuccessful Motion for Rehearing and Alternative Motion to Transfer to Court en Banc, the petitioners herein, Caneer and Sowell, have made application to this Court for Writ of Certiorari.

It should be stated here that at the trial of this case in the Circuit Court the following admission was entered into.

ADMISSION No. 6

"It is admitted and agreed upon by the parties to this case that the improvements in Drainage District No. 4 were completed prior to the assessment made by the County Court of Dunklin County, Missouri, in April, 1912" (R. 54).

MISSOURI STATUTE OF LIMITATIONS

During all the period of time involved in this proceeding there was in force and effect in Missouri what is now Section 1013, R. S. Mo., 1939, and which is as follows:

"Section 1013. What actions shall be commenced within ten years

Within ten years: First, an action upon any writing, whether sealed or unsealed, for the payment of money or property; second, actions brought on any covenant of warranty contained in any deed of conveyance of land shall be brought within ten years next after there shall have been a final decision against the title of the covenantor in such deed, and actions on any covenant of seizin contained in any such deed shall be brought within ten years after the cause of such action shall accrue; third, actions for relief, not herein otherwise provided for".

The opinion of the Missouri State Supreme Court has not yet been officially reported, but is reported in the case of State ex rel. McGee for Use and Benefit of Drainage District No. 4 *vs.* Wilson, et al., No. 40898, 220 S. W. (2d), 6.

Although the ten-year statute of limitations as provided in Section 1013 R. S. Mo., 1939, was pleaded in the answer, called attention to in Petitioner's Brief, authorities cited

and argued in the Missouri Supreme Court it will be noted that the Supreme Court ignored and did not pass upon such question at all.

Rule of Missouri Supreme Court on Motions for Rehearing

Rule 1.19 of the Missouri Supreme Court is as follows:

"Motions for rehearing shall briefly and distinctly state the grounds upon which a rehearing is sought. They may be accompanied by suggestions in support containing citation of authorities. Such motion must be filed within fifteen days after the opinion of the court shall be filed, and the motion and suggestions must be served on the adverse party or his attorney within said time. After a cause has been reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court.

The sole purpose of a motion for rehearing is to call attention to material matters of law or fact overlooked or misinterpreted by the court, as shown by its opinion. Mere re-argument of issues determined by the opinion will be disregarded.

If desired, suggestions in opposition to a motion for rehearing may be filed within ten days after the expiration of the time for filing of such motion, and a copy of such suggestions shall be served on the adverse party or his attorney within said time".

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

(THOMAS WILSON), W. C. CANEER and MILLIE A. SOWELL, Petitioners, vs. STATE ex rel. W. D. McGEE, Treasurer and Ex Officio Collector of Dunklin County, Missouri, for the Use and Benefit of Drainage District No. 4, etc., Respondent.	No. 361.

On Petition for Writ of Certiorari to the Supreme Court of the State of Missouri.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

(THOMAS WILSON), W. C. CANEER and MILLIE A. SOWELL, Petitioners, vs. STATE ex rel. W. D. McGEE, Treasurer and Ex Officio Collector of Dunklin County, Missouri, for the Use and Benefit of Drainage District No. 4, etc., Respondent.	No. 361.

On Petition for Writ of Certiorari to the Supreme Court of the State of Missouri.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Supreme Court of Missouri is reported as State ex rel. McGee, Collector, for the Use and Benefit of Drainage District No. 4, etc., v. Thomas Wilson et al., 220 S. W. (2d) 6 (not yet officially reported). Copy of opinion (R. 79-85).

OTHER OPINIONS INVOLVED.

The opinion of the Missouri Supreme Court, Division 1, reported in State ex rel. Dunklin County, Collector, to Use of Drainage District No. 4, etc., v. Redman, 270 Mo. 465, 194 S. W. 260.

The opinion of the United States Court of Appeals reported in Drainage District No. 4 v. Murphy, 119 Fed. (2) 390.

The opinion of the United States District Court, Honorable George H. Moore, Judge (not reported), contained in Plaintiff's Exhibit No. 270, pages 43-50, filed in this Court.

The opinion of the United States District Court in Murphy v. Drainage District No. 4 et al., reported in 17 Fed. Supp. 128.

JURISDICTION.

The jurisdiction of this court is invoked under Section 240a of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

Whether this court will issue a writ of certiorari where (1) the petitioners failed to raise a federal question in their pleading in the trial court because they only made general reference to certain sections and amendments of the Constitution of the United States without showing how same were violated; (2) during the trial there was no objection based on a violation of a federal law or the federal Constitution, the objections being limited to alleged violations of the state Constitution; (3) the trial court in its decision failed to mention or decide a federal

question; (4) petitioners in their brief on the appeal to the Supreme Court of Missouri expressly stated that the case involved only a question of state law and no federal law was in any way involved and failed in their Points and Authorities and Argument in said brief to make reference to a federal question; (5) the Missouri Supreme Court in its decision failed to mention or determine a federal question; (6) in petitioners' Motion for Rehearing and in the alternative Motion to Transfer to Court en Banc and Suggestions in Support Thereof, no mention was made of a federal question and (7) the federal questions mentioned in petitioners' application to this court are no longer open questions in this court and the decision of the Missouri Supreme Court is in accord with the applicable decisions of this court.

STATUTES INVOLVED.

Section 57 of the 1919 Act of the Missouri Legislature, now Section 12454, Revised Statutes of Missouri, 1939 (See Appendix);

Section 17 of the 1919 Act of the Missouri Legislature, now Section 12413, Revised Statutes of Missouri, 1939 (See Appendix);

Article 4 of Chapter 41 of the Revised Statutes of Missouri, 1909, as amended by Laws of Missouri, 1913, pages 271-281.

STATEMENT.

Suit was filed by the Respondent in the Circuit Court of Dunklin County, Missouri, to enforce and collect certain supplemental drainage district assessments levied in 1941 by Drainage District No. 4 of Dunklin County, Missouri, against lands embraced in said Drainage District. The supplemental assessment was made pursuant to the mandate of the United States District Court for the Eastern Judicial District of Missouri, Southeastern Division, which mandate was affirmed by the United States Circuit Court of Appeals, 119 Fed. 2d 390. The Petitioners for the writ of certiorari in this Court filed an answer wherein they alleged that for the Court to sustain the said assessments would be violative and contrary to the V Amendment and XIV Amendment and Section 10 of Article I of the Constitution of the United States (R. 17, 23). The trial court found in favor of the Defendants (Petitioners here), holding that a previous decision of the Missouri Supreme Court, **State ex rel. Douglass v. Redman**, 270 Mo. 465, 194 S. W. 260, was res judicata. It made no mention of a federal question being involved and did not determine any federal question (R. 62-68). On appeal to the Missouri Supreme Court, Petitioners in their brief stated that the case before that Court devolved upon a question involving state law as there was no federal law in any way involved in the case. In their Points and Authorities and in the argument contained in said brief, they made no mention of a federal question. (See Stipulation, Appendix to this Brief, pp. 29 to 33). The Missouri Supreme Court in its opinion (R. 79-85), 220 S. W. 2d 6 (not yet officially reported), ruled that the Appellant was not barred by State ex rel. Douglass v. Redman, supra, but that the defendants were barred by the judgment of the United States District Court in Murphy v. Drainage Dis-

trict No. 4, 17 Fed. Supp. 128, and the judgment of the United States District Court (not reported) contained in Plaintiffs' Exhibit No. 270, pp. 43-50, filed in this Court that was affirmed by the United States Circuit Court of Appeals (Eighth), 119 Fed. 2d 390, directing by mandamus the Drainage District to make the supplemental assessments which this suit sought to enforce. It further held that the 1913 Act of the Missouri Legislature in 1913 Laws of Missouri, pp. 271-281, authorized such supplemental assessment and that said 1913 Act did not contravene the constitution of the State of Missouri. In defendants' Motion for Rehearing and in the Alternative Motion to Transfer to Court en Banc and Suggestions in Support Thereof, no mention was made of any federal question (R. 86-107). Subsequently, the Defendants filed a petition in this Court for a writ of certiorari to the Supreme Court of the State of Missouri.

SUMMARY OF ARGUMENT.

I.

The petitioners not only failed to raise or preserve a federal question, but if they did, they expressly waived such federal question in their brief which they filed in the Supreme Court of Missouri, wherein they said:

> "This case devolves upon a question involving state law as there is no federal law in any way involved in the case."

The Points and Authorities and Argument contained in said brief made no reference to a federal question.

II.

The Missouri Supreme Court has held that not only must a federal constitutional question be raised at the earliest practical opportunity in the trial court, but it must be kept alive throughout the whole progress of the case. Failure to do so will constitute an abandonment of the constitutional question. The federal constitutional question must not be merely colorable, but it must be a substantial one.

There were not sufficient allegations in petitioners' answer in the trial court to sufficiently raise a federal constitutional question. During the trial there was no objection made based on the violation of the federal law or the federal constitution. The objections were limited to alleged violations of the state constitution. The trial court in its opinion made no reference to a federal question, nor did it decide a federal question (R. 62-68). It is the rule of the Missouri Supreme Court that even if a federal question had been sufficiently raised in the pleadings by a party such question will be deemed to have been abandoned

on the appeal if no reference is made thereto in the Points and Authorities and the Argument contained in the brief filed in the Supreme Court.

III.

Where federal constitutional questions have been waived by failure to follow the procedure designed by the courts of Missouri for the protection of federal rights, same will not be entertained by the United States Supreme Court.

IV.

The decision of the Missouri Supreme Court did not determine a federal question.

The principle has been established by this court that, where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the United States Supreme Court will not undertake to review it by certiorari.

V.

Under rule 38 of the United States Supreme Court a writ of certiorari to review a decision of a state court will not issue where a state court has decided a federal question of substance in accord with applicable decisions of this court. The validity of reassessment statutes enacted after the work has been done is no longer an open question.

VI.

The Act of the Missouri Legislature of 1913 involved in this case was not wholly repealed by the 1919 Act. The repeal was limited, since Section 57 of the 1919 Act, now

Section 12454, Revised Statutes of Missouri 1939 (see appendix), provided that the repeal of the 1913 Act should not have the effect of suspending, abating, abridging, impairing, vitiating or nullifying any right, power, remedy or lien theretofore given, created or conferred upon any drainage district organized prior to the passage of said act but that all such rights, powers, remedies and liens are directly preserved to all such drainage districts and that all rights, powers, liens and remedies then existing in behalf of any drainage district might be enforced and made available under the provisions of said 1919 Act, if applicable, at the election of the drainage district.

ARGUMENT.

I.

The petitioners not only failed to raise or preserve a federal question, but if they did, they expressly waived such federal question in their brief which they filed in the Supreme Court of Missouri.

The trial court, Circuit Court of Dunklin County, did not pass on a federal question (R. 62-68).

As appears from the stipulation filed in this court, which is printed as part of the appendix to this brief, pp. 29 to 33, petitioners on page 49 of their brief filed in the Missouri Supreme Court in this case made the following statement:

> "This case devolves upon a question involving state law as there is no Federal Law in any way involved in the case.
>
> "Respondents assert that measured by the yardstick of our State Law and our Missouri Constitution the 1919 Act does not justify the assessment made in this case and will not support it."

It further appears from said stipulation that the points and authorities and argument contained in said brief made no reference to a federal question. See appendix to this brief, pp. 29 to 33. All references are specifically to the Missouri Constitution. An averment that a state statute is unconstitutional and void is not sufficient to raise a federal question but is to be taken as referring to the Constitution of the state, and not to the Constitution of he United States. **Kipley v. Illinois ex rel. Akin**, 170 U. S. 182, 18 S. Ct. 550, 42 L. Ed. 998, 1001; **F. G. Oxley Stave Co. v. Butler County**, 166 U. S. 648, 41 L. Ed. 1149; **Layton v. Missouri**, 187 U. S. 356, 47 L. Ed. 214; **Bowe v. Scott**, 233 U. S. 658, 664, 58 L. Ed. 1141, 1145.

The Supreme Court of Missouri in its opinion treats of the constitutional question raised in the following language (R. 83):

> "Since the county court had the authority at the time it made the original assessment to have made it adequate to pay all of the bonds without infringing any rights of landowners, the Legislature could without depriving anyone of any constitutional rights empower the county court to make supplementary assessments to discharge the bonds without first giving notice to the property owners of the district . . ."

and further on (R. 84):

> "What we have said disposes of the constitutional questions presented by the landowners."

Since only state constitutional questions were presented, only state constitutional questions were determined.

In **International Steel & Iron Co. v. National Surety Co.**, 297 U. S. 657, 80 L. Ed. 961, the court said, l. c. 965:

> "In the course of the opinion the Court said: '. . . our construction of Chapter 80 of the Acts of 1929 does not bring that statute into any constitutional difficulty.' Except for this statement, the record failed to disclose that a question under the Federal Constitution had been presented or decided. In the circumstances, this court had no jurisdiction upon appeal."

No federal question was raised in petitioners' Motion for Rehearing and in the alternative Motion to Transfer to Court en Banc and suggestions in support thereof filed in the Missouri Supreme Court (R. 86-92).

In **Butler v. Gage**, 138 U. S. 52, 34 L. Ed. 869, l. c. 872, this court said:

"The Supreme Court of the State confessedly went to judgment without any suggestion that a federal question was presented for its determination, and not even in the petition for rehearing was any such question brought to the attention of the court. And the disposition of the motion that oral argument be permitted after the petition for rehearing was denied, did not, in itself, necessarily involve the decision of a federal question.

"We cannot, under such circumstances, reexamine the judgment and orders of that court, and the writ of error must be dismissed."

Rule 38 of the United States Supreme Court, dealing with the granting of writs of certiorari, provides as follows:

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling or fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

II.

The Missouri Supreme Court has held that not only must a federal constitutional question be raised at the earliest practical opportunity in the trial court, but it must be kept alive throughout the whole progress of the case. Failure to do so will constitute an abandonment of the constitutional question. The federal constitutional ques-

tion must not be merely colorable, but it must be a substantial one.

Petitioners allege in their answer (R. 17) as follows:

> "Defendant further alleges that under the Constitution of the United States, Amendment V, and Section 30, Article 2, Constitution 1875, Section 10, Article I, Constitution 1945, of the State of Missouri, one can not be deprived of their property without due process of law."

And also (R. 23):

> "33. Defendant states that for the court to sustain plaintiff's petition in this case and to sustain the levy of increased assessments on the lands in Drainage District No. 4 to pay the judgment would be violative and contrary to the 5th Amendment, the 14th Amendment and Section 10 of Article I of the Constitution of the United States, and would further be violative of and contrary to Sections 15, 20 and 30 of Article 2 and Section 53 of Article 4, Subdivisions (1), (32) and (33) of the Missouri Constitution, and this defendant specifically pleads the Constitutions of the United States and the State of Missouri as a complete bar to any lawful authority existing in plaintiff to collect any additional levy or assessment against the lands of defendant."

It will be seen from **McGill v. City of St. Joseph**, and other cases, infra, that such allegations are mere statements of conclusions and do not raise constitutional questions.

During the trial there was no objection made based on the violation of a federal law or the federal constitution (R. 37-61). The objections were limited to alleged violations of the state constitution (R. 52-53).

In **McGill v. City of St. Joseph,** 31 S. W. (2d) 1038 (Mo. Sup., not officially reported), the petition contained this allegation (p. 1039):

> "That said ordinance and the provisions complained of are unconstitutional and void, in that they violate the rights guaranteed to plaintiffs by section 4, article II, of the Constitution of Missouri. Said ordinance is also unconstitutional and void and the title thereof defective so that it deprives plaintiffs of rights and property without due process of law as guaranteed by section 30 of article II of the Constitution of the State of Missouri."

The trial court found that the ordinance was not authorized by and in fact was in derogation of the act of the General Assembly and therefore was invalid and unenforcible and further that certain provisions of the ordinance were unreasonable and invalid and therefore the plaintiff was entitled to an injunction to restrain the defendant City from enforcing certain provisions of said ordinance. On appeal the Supreme Court said, l. c. 1040:

> "If we have jurisdiction, it can only be upon the ground that a constitutional question is involved."

Further on the court said, l. c. 1040:

> "The only reference to a constitutional question that appears anywhere in the record of the trial court is the above-quoted paragraph of plaintiff's petition. Viewing that allegation in the most benign spirit, it can hardly be said to present a constitutional question. It states conclusions merely. In State v. Goad, 296 Mo. 452, 246 S. W. 917, 918, we said that 'the mere assertion * * * that the state statute is in conflict with certain numbered sections of the Constitution, without a statement of their nature or the facts which create the conflict, will not confer jurisdiction,'

and in Chapman v. Adams, 230 S. W. 80, 81, that 'it is not sufficient to say, either here or in the trial court, that the judgment violates a certain provision of the Constitution, but it must be made to appear wherein it is alleged to be violated.' In Dorrah v. Pemiscot County Bank (Mo. Sup.), 248 S. W. 960, a pleading no more vague than that in this case was held to state only conclusions and not to raise a constitutional question. See, also, State v. Nece (Mo. Sup.), 248 S. W. 963, and cases cited.

"But if we treat the pleading as sufficient to present a constitutional question, that question has been abandoned and is no longer in the case."

Further on the court says, l. c. 1041:

"Respondent asserts no constitutional question in this court. It does not mention that question in its brief or argument here, but seeks to sustain the trial court's judgment solely on the grounds that the assailed provisions of the ordinance are invalid because in contravention of the statute and because unreasonable. In a similar situation we held in California Special Road Dist. v. Bueker, 248 S. W. 927, that the constitutional question had dropped out of the case. In that case the defendant had raised the question below by its pleadings and objections to evidence, and it had been ruled adversely to the defendant. The defendant won, however, on the facts and the plaintiff appealed. We there said: 'As previously stated, at the time the defendant objected to the offer of testimony, the court ruled in favor of the appellant. The constitutional question was not thereafter raised, either in the instructions given or refused, in the motion for new trial, or in appellant's brief. The respondent concluded to "let the Constitution shift for itself" and has filed no brief. The ques-

tion was not kept alive, and was not in the case at the time the appeal was taken, and is therefore not presented by this appeal. (Citing cases.) It was eliminated in the trial'—citing cases.

"In the instant case appellant, as above stated, does brief the question, but not as an assignment of error, and, moreover, as shown, appellant did not attempt to keep the question alive in the trial court. See, also, Ranney v. City of Cape Girardeau, supra, in which case the constitutional question was raised in the trial court by the plaintiff, who prevailed below, but it did not appear 'that the decree decided any constitutional question adversely to appellant.' It was held that this court was without jurisdiction. In Municipal Securities Corp. v. Kansas City, 186 S. W. 989, which in this regard was similar to the instant case, we held that appellate jurisdiction was in the Court of Appeals. See, also, Brown Shoe Co. v. Aetna Life Ins. Co. (Mo. Sup.), 281 S. W. 963. In that case the record did not show whether the trial court decided the case on the constitutional question or not. The appellant, as here, did not mention that question in its motion for new trial and the respondent who had raised it by its pleading below (also as in this case) did not brief it in this court, wherefore it was held to have been abandoned. See, also, Cooper County Bank v. Bank of Bunceton, 310 Mo. 519, 524, 276 S. W. 622, 624, wherein it is said: 'Whichever party raised the question below may abandon it upon appeal. The contention of unconstitutionality having been abandoned after appeal, the question is no longer in the case, and the only reason for us to retain jurisdiction disappears.' "

In **City of Laclede v. Libby**, 278 S. W. 372 (Mo. Sup., not officially reported), the Missouri Supreme Court held that it was without jurisdiction of the appeal unless the

case was one involving the construction of the Constitution of the United States or of the State of Missouri. The answer pleaded as a defense that the ordinances relied on by plaintiff in its petition were unreasonably oppressive and attempted to take defendant's property and subject it to unreasonable burdens without due process of law as defined by the Constitution of the United States and of the State of Missouri. The court said in its opinion that an examination of the abstract of record disclosed that no claim of a constitutional right was asserted by the appellant at the trial. Neither the motion for new trial nor the motion in arrest of judgment referred to a constitutional question. In determining that the Supreme Court had no jurisdiction, the court said, l. c. 473:

> "While neither party to this action has challenged the right of this court to assume jurisdiction of the appeal, inasmuch as jurisdiction cannot be conferred upon us by silence or consent, we may examine the record and determine therefrom whether we have acquired jurisdiction because of any real, rather than a mere colorable, constitutional question. Burns v. Prudential Insurance Co., 295 Mo. 680, 247 S. W. 159, and cases there cited. Not only must a constitutional question be raised at the earliest practical opportunity in the trial court, but it must be kept alive throughout the whole progress of the case. Lavelle v. Insurance Co. (Mo. Sup.), 231 S. W. 616; Scott v. Dickinson (Mo. Sup.), 217 S. W. 270; Severson v. Dickinson (Mo. Sup.), 248 S. W. 595. Nor will this court retain jurisdiction on appeal if the constitutional question is merely colorable and evidently not one of substance. Lohmeyer v. Cordage Co., 214 Mo. 685, 113 S. W. 1108; Vanderberg v. Gas Co., 199 Mo. 455, 97 S. W. 908; Burns v. Insurance Co., 295 Mo. 680, 247 S. W. 159. We find no constitutional question of substance, presented and decided in the trial court, kept alive during

the progress of the trial, or preserved in the record before us, sufficient to confer jurisdiction upon this court in this cause. Chapman v. Adams (Mo. Sup.), 230 S. W. 80; West v. Dyer (Mo. Sup.), 212 S. W. 880; Hulett v. Railway Co., 145 Mo. 35, 46 S. W. 951; Independence v. Knoepker, 205 Mo. 338, 103 S. W. 940."

In **State ex rel. Luechtefeld v. Arnold,** 144 S. W. (2d) 60 (Mo. Sup., not officially reported), the relator in a mandamus proceeding sought to compel the issuance of permits to build five dwellings in the City of Richmond Heights, Missouri. Refusal was based on a zoning ordinance which authorized dwellings for one family only in the district where relator sought to build. The court found in favor of the respondent. The relator invoked the jurisdiction of the Supreme Court on the ground that there was a constitutional question involved with reference to the zoning ordinance. Relator pointed to certain language in his petition which he claimed raised the constitutional question. Dealing with this point, the Missouri Supreme Court said, l. c. 60:

> "Even if this general statement could be held sufficient to originally raise a constitutional question, we would still have to hold that it has been abandoned on this appeal because there is no reference to any constitutional provision whatever in relator's 'Points and Authorities' or even in the 'Argument' in his brief; instead, relator cites zoning statutes and argues invalidity of the ordinance because of failure of the city to comply with their requirements."

In **Mueller v. Klinhart** (1942), 164 S. W. (2d) 928 (Mo. Sup., not officially reported), the Missouri Supreme Court held that constitutional questions raised in the answer had been waived by failure to preserve same in the defendants'

brief by assignments of error or otherwise. The court said, l. c. 928:

> "Defendants' answer and cross bill attempted to raise some constitutional questions, but these have been abandoned by failure to preserve any such issues in defendants' brief by assignment of error or otherwise. Wright v. Tucker (Mo. Sup.), 137 S. W. (2d) 557; State ex rel. Luechtefeld v. Arnold (Mo. Sup.), 144 S. W. (2d) 60."

In **Wright v. Tucker**, 137 S. W. (2d) 557 (Mo. Sup., not officially reported), where the defendant claimed violation of the due process of law and equal protection of law of the state and federal constitutions, the court held that these constitutional contentions were abandoned by failing to set them out as assignments of error and by not mentioning them in defendant's Points and Authorities or Argument.

In the case of **Bankers' Mortgage Co. v. Lessley**, 31 S. W. 2d 1055 (Mo. Sup. not officially reported), the Missouri Supreme Court said, l. c. 1058:

> "And though timely raised in the trial court, if the constitutional question is not briefed nor urged nor relied upon in this court, it will be deemed abandoned, and, when our jurisdiction depends solely upon such question being involved, we will not retain jurisdiction, even where the case was properly sent here on appeal because of the appearance of such question in the record." See also Homan v. Mo. Pac. R. Co., 64 S. W. (2d) 617, l. c. 621, 334 Mo. 61 (en banc), cert. denied 291 U. S. 683, 78 L. Ed. 1070.

III.

Where federal constitutional questions have been waived by failure to follow the procedure designed by the courts of Missouri for the protection of federal rights, same will not be entertained by the United States Supreme Court.

Central U. Telephone Co. v. Edwardsville, 269 U. S. 190, 70 L. Ed. 229, 46 S. Ct. 90;

Parker v. Illinois, 333 U. S. 572, l. c. 574, 92 L. Ed. 886, 888.

The Supreme Court of the United States in the recent case of **Congress of Industrial Organizations v. Robert E. McAdory**, 325 U. S. 472, 477, 89 L. Ed. 1741, held that the United States Supreme Court would not consider a federal constitutional question in the first instance where the federal constitutional question was not passed on by the Circuit Court (trial court) and was not raised by assignment of error in the Alabama Supreme Court, and that court did not pass on that question in its opinion in view of the fact that the Alabama Supreme Court will not consider errors which have not been assigned. Mr. Chief Justice Stone said:

> "Further the contention that Sec. 16 conflicts with the National Labor Relations Act, cf. Hill v. Florida, No. 811, decided this day (325 U. S. 537, post 1782, 65 S. Ct. 1373), was not passed on by the Circuit Court, was not raised by assignment of error in the Alabama Supreme Court, and that court did not pass on that question either in its opinion in this case or in its opinion in the Alabama State Federation of Labor, U. B. C. J. Case which it adopted as controlling.
>
> "The Alabama Supreme Court will not consider errors which have not been assigned, Rowland v.

Plummer, 50 Ala. 182, 197; Pettibone-Taylor Co. v. Farmers Bank & T. Co., 156 Ala. 666, 46 So. 751; Malaney v. Ladura Mines Co., 191 Ala. 655, 65 So. 666; Nichols v. Hardegree, 202 Ala. 132, 79 So. 598; Halle v. Brooks, 209 Ala. 486, 96 So. 341, or which have not been specifically and precisely raised in the assignments of error, Kinnon v. Louisville & N. R. Co., 187 Ala. 480, 65 So. 397; Carney v. M. C. Kiser Co., 200 Ala. 527, 76 So. 853; Hall v. Pearce, 209 Ala. 397, 399, 96 So. 608; Jackson Lumber Co. v. Butler, 244 Ala. 348, 13 So. (2d) 294, 298. Since the State Supreme Court did not pass on the question now urged, and since it does not appear to have been properly presented to that court for decision, we are without jurisdiction to consider it in the first instance here. Caperton v. Bowyer, 14 Wall. (U. S.) 216, 236, 20 L. Ed. 882, 884; Hulbert v. Chicago, 202 U. S. 275, 280, 281, 50 L. Ed. 1026, 1028, 1029, 26 S. Ct. 617; Dorrance v. Pennsylvania, 287 U. S. 660, 77 L. Ed. 570, 53 S. Ct. 222; Chandler v. Manifold, 290 U. S. 665, 78 L. Ed. 575, 54 S. Ct. 93; See also Flournoy v. Wiener, 321 U. S. 253, 88 L. Ed. 703, 64 S. Ct. 548; Charleston Federal Sav. & L. Asso. v. Alderson, No. 400, this term (324 U. S. 182, 185, ante, 857, 860, 65 S. Ct. 624), and cases cited."

Petitioners come within the rule of **Hulbert v. Chicago**, 202 U. S. 275, 281, 50 L. Ed. 1026, where the issue was whether a federal question had been preserved in the State Supreme Court. The court held, l. c. 202, U. S. 280-281:

"We do not think that the plaintiff in error complied with Sec. 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), in setting up a right under the Constitution of the United States. The mere claim in the objections to the confirming of the assess-

ment, never afterwards brought to the attention of the trial court or of the supreme court, was not sufficient. There is no evidence in the record to show that the decision of either of the courts was invoked by plaintiff in error upon a right claimed under the Constitution of the United States."

Further on the court says:

"Errors assigned, but not noticed or relied on in the brief or argument of counsel will be regarded as waived or abandoned. Keyes v. Kimmel, 186 Ill. 109, 114, 57 N. E. 851. And such rule of practice will be recognized by this court. Erie R. Co. v. Purdy, 185 U. S. 148, 153, 46 L. Ed. 847, 850, 22 Sup. Ct. Rep. 605. It follows that this court has not jurisdiction of this writ of error."

The rule of the Missouri Supreme Court that the mere assertion that a state statute is in conflict with certain numbered sections of the federal constitution is only the statement of a conclusion and does not raise a federal question also prevails in the United States Supreme Court.

Witness, Clarke v. McDade, 165 U. S. 168, l. c. 172, 41 L. Ed. 673, l. c. 674, wherein it is said:

"A general statement that the decision of a court is against the constitutional rights of the objecting party or against the 14th Amendment, or that it is without due process of law, particularly when these objections appear only in specifications of error, so called, will not raise a federal question even when the judgment is a final one within the section of the Revised Statutes above mentioned. There must be at least some color of a federal question. Hamblim v. Western Land Co., 147 U. S. 531."

Although the Hulbert case, supra, is concerned with jurisdiction of the Supreme Court on a writ of error, the same rule has been applied in ruling on petitions for certiorari. As said in **Williams v. Kaiser, 323 U. S. 471, 477-478, 89 L. ed. 398, 403:**

> "It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction, and that its decision of the federal question was necessary to its determination of the cause. Honeyman v. Hanan, 300 U. S. 14, 18, 81 L. ed. 476, 478, 57 S. Ct. 350; Lynch v. New York, 293 U. S. 52, 79 L. ed. 191, 55 S. Ct. 16. And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it. Klinger v. Missouri, 13 Wall. (U. S.) 257, 263, 20 L. ed. 635, 637; Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U. S. 293, 297, 35 L. ed. 193, 195, 11 S. Ct. 528; Allen v. Arguimbau, 198 U. S. 149, 154, 155, 49 L. ed. 990, 993, 25 S. Ct. 622; Lynch v. New York, 293 U. S. 52, 79 L. ed. 191, 55 S. Ct. 16, supra."

IV.

Where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the United States Supreme Court will not undertake to review it by certiorari.

Williams v. Kaiser, 323 U. S. 471, 477-478, 89 L. ed. 398, 403.

The only real question presented by petitioners to this court is not a federal question. Petitioners assign as a basis of opinion of the state court that the Missouri Supreme Court ruled that the judgment in the case of Joseph D. Murphy v. Drainage District No. 4, 17 Fed. Supp. 128, and the judgment of the United States Court of Appeals in Drainage District No. 4 et al. v. Murphy, 119 Fed. (2d) 390, are res adjudicata, binding upon the landowners and could not be reopened and reviewed (Petition for Writ of Certiorari, 16). It has been several times held by this court that a finding of res judicata by the highest state court is a matter of state law, conclusive on the Supreme Court and not reviewable.

The leading case is Chouteau v. Gibson, 111 U. S. 200, 28 L. ed. 400.

> "The legal effect of the judgment set up in bar is a question of general law as to which the decision of the state court is not reviewable here. The federal questions, if any there were in the case, lay behind this defense and could not be reached until it was out of the way. The question presented by the defense was not whether a federal right had been properly denied by a former judgment, but whether the right had been once judicially determined so as to become res judicata between the parties. Whether an equitable title could be set up in bar of the action at law brought by Gibson, the holder of the legal title, to recover possession, is a question of state law upon which the judgment of the state court is conclusive."

The following is the entire opinion of the court in The City and County of San Francisco v. Itsell, 133 U. S. 65, 33 L. ed. 570.

> "This court has no jurisdiction to review a judgment of the highest court of a State, unless a federal

question has been, either in express terms or by necessary effect, decided by that court against the plaintiff in error. Rev. Stat. § 709; New Orleans Water Works v. Louisiana Sugar Refining Co., 125 U. S. 18; DeSaussure v. Gaillard, 127 U. S. 216; Hale v. Akers, 132 U. S. 554.

"In the present case, the record of the pleadings, findings of fact and judgment shows that it was unnecessary for that court to decide, and its opinion filed in the case and copied in the record shows that it did not decide any question against the plaintiff in error, except the issue whether the former judgment rendered against it and in favor of the grantor of the defendants in error was a bar to this action. That was a question of general law only, in no wise depending upon the Constitution, treaties or statutes of the United States. Chouteau v. Gibson, 111 U. S. 200.

"Writ of error dismissed for want of jurisdiction."

In connection with this matter of res judicata, see also Montezuma Canal Co. v. Smithville Canal Co., 218 U. S. 371, 382, 54 L. Ed. 1077-78.

V.

Under Rule 38 of the United States Supreme Court a writ of certiorari to review a decision of a state court will not issue where a state court has decided a federal question of substance in accord with applicable decisions of this court. The validity of reassessment statutes enacted after the work has been done is no longer an open question.

In Lombard v. West Chicago Park Commissioners, 181 U. S. 33, 45 L. ed. 731, this court said, 181 U. S., l. c. 42:

"It is no longer open to question that where a special assessment to pay for a particular work has been

held to be illegal, no violation of the Constitution of the United States arises from a subsequent authority given to make a new special assessment to pay for the completed work. Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921.

"With these two propositions in mind it is certain that if the power flowing from the ordinance which the Supreme Court of the State of Illinois upheld existed prior to the work, the assessment was valid. So, also, if the authority was only given subsequent to the work, it was, from the point of view of the Constitution of the United States, legally conferred. In either contingency, therefore, there was no cause of complaint so far as Federal rights were concerned."

In Seattle v. Kelleher, 195 U. S. 351, 49 L. ed. 232, l. c. 360, Mr. Justice Holmes had this to say:

"The principles of taxation are not those of contract. A special assessment may be levied upon an executed consideration, that is to say, for public work already done (citing cases). If this were not so it might be hard to justify reassessments. * * * A reassessment may be a new assessment. Whatever the Legislature could authorize if it were ordering an assessment for the first time it equally could authorize, notwithstanding a previous invalid attempt to assess. The previous attempt left the city free 'to take such steps as were within its power to take, either under existing statutes, or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property' in any constitutional way. Norwood v. Baker, 172 U. S. 269, 293, 43 L. ed. 443, 452, 19 Sup. Ct. Rep. 187, 196; McNamee v. Tacoma, 24 Wash. 591, 64 Pac. 791; Annie Wright Seminary v. Tacoma, 23 Wash. 109, 62 Pac. 444.

"We think it unnecessary to consider other questions on the part of the case that we have dealt with. We have said enough in our opinion to show that the enforcement of the assessment lien could not be prevented by the original owner. It is urged, however, that a different rule could be applied in favor of one who purchased the land under the circumstances stated above. But the attempt to liken taxation, whether general or special, to the enforcement of a vendor's lien, and thus to introduce the doctrine concerning bona fide purchasers for value, rests on a fallacy similar to that which we have mentioned above, which would deny the right to tax upon an executed consideration. A man cannot get rid of his liability to a tax by buying without notice. See Tallman v. Janesville, 17 Wis. 71, 76; Cooley, Taxn., 3d ed., 527, 528. Indeed, he can not buy without notice, since the liability is one of the notorious incidents of social life. In this case the road was cut through the plaintiff's land, and, if he had looked, was visible upon the ground. Whether it had been paid for was for him to inquire. The history of what had happened would have suggested that it was not improbable that sooner or later a payment must be made."

Reassessments without notice have been sustained against federal constitutional objections and, therefore, their validity no longer presents a live constitutional question.

Roberts v. Irrigation District, 289 U. S. 71, 77 L. ed. 1038 (work finished 1920; additional assessment 1931);

Hagar v. Reclamation Dist., 111 U. S. 701, 28 L. ed. 569;

Breiholz v. Pocahontas County, 257 U. S. 118, 66 L. ed. 159.

VI.

Petitioners in their petition, p. 18, state that the Act of 1913 involved in this case was specifically repealed in 1919. They failed to state that the repeal was a limited or qualified repeal; that Section 57 of Laws of Missouri, 1919, pp. 320-321, now Section 12454, Revised Statutes of Missouri, 1939 (see Appendix), provides that the repeal of the 1913 Act shall not have the effect of suspending, abating, abridging, impairing, vitiating or nullifying any right, power, remedy or lien theretofore given, created or conferred upon any drainage district organized prior to the passage of said act but that all such rights, powers, remedies and liens are directly preserved to all such drainage districts and that all rights, powers, liens and remedies then existing in behalf of any drainage district might be enforced and made available under the provisions of said 1919 Act, if applicable, at the election of the drainage district. They merely print the title of the Act as part of the Appendix to their petition for writ of certiorari filed in this court (R. 58). We have set forth in our Appendix that portion of the Act which shows that the 1919 Act is only a limited repeal of the 1913 Act. The reply in the trial court specifically referred to this limited repeal (R. 35).

CONCLUSION.

No federal question having been raised and kept alive and preserved, and, moreover, the decision of the Missouri Supreme Court being in accord with the decisions of this Court, the petition for writ of certiorari should be denied.

Respectfully submitted,

DAVID BARON,
Attorney for Respondent.

APPENDIX.

In the Supreme Court of the United States.

State ex rel. W. D. McGee, Treasurer and Ex-Officio Collector of Dunklin County, Missouri, for the Use and Benefit of Drainage District No. 4 of Dunklin County, Missouri, a Duly Organized Drainage District of Said County,

vs.

Thomas Wilson et al.

STIPULATION.

It is hereby agreed by and between the parties hereto that Respondents' Statement, Brief and Argument filed in the Supreme Court of Missouri on the appeal in the above entitled cause contained the following statement on page 49 thereof, to-wit:

> "This case devolves upon a question involving state law as there is no federal law in any way involved in the case.
>
> Respondents assert that measured by the yardstick of our state law and our Missouri Constitution the 1919 Act does not justify the assessment made in this case and will not support it."

The respondents in the Missouri State Supreme Court, Thomas Wilson et al., also incorporated in their brief, pages 19, 20 and 21, the following points and authorities cited thereunder:

"Brief.

(Points and Authorities.)

I.

All questions pertinent to the law of this case has been heretofore settled. In April, 1912, the bondholders sought an additional assessment to cover the bonds which were merged into judgment in the Murphy case and the County Court made the additional assessment requested. But the Circuit Court of Dunklin County ruled such assessments could not be collected and this Court affirmed such judgment. The opinion of this Court constitutes full and complete res adjudicata.

State ex rel. Douglass v. Redman, 194 S. W. 260, 270 Mo. 465.

II.

The provisions of the 1913 Act could not be made applicable to Drainage District No. 4.

(a) This Court in the Redman case above referred to specifically so ruled in 1917 after the 1913 Amendment.

(b) If it be contended that the 1913 Amendment should be made applicable to Drainage District No. 4, then the 1913 Amendment would be unconstitutional.

Section 15, Article 2, Mo. Cons. 1875;
Section 30, Article 2, Mo. Cons. 1875;
Section 28, Article 4, Mo. Cons. 1875;
Lucas v. Murphy, 156 S. W. (2d), l. c. 690;
Buder v. First National Bank, 16 Fed. (2d), l. c. 992;
Cornet v. St. Louis County, 240 S. W., l. c. 111;
State v. North, 264 S. W., l. c. 681, 304 Mo. 607;
State v. Walker, 34 S. W. (2d), l. c. 131, 326 Mo. 123.

III.

The 1919 Amendment to the County Court Drainage District Law is also not applicable to Drainage District No. 4.

(a) The Redman opinion of this Court when analyzed clearly rules that no subsequent act of the Legislature could affect Drainage District No. 4 which was organized and final judgment of the County Court rendered in 1905.

(b) If it be contended that the 1919 Amendment is applicable to Drainage District No. 4, then such 1919 Amendment would be unconstitutional.

(See authorities cited under II.)

IV.

The fact that the bonds in the Murphy case have been merged into judgment cannot enlarge the powers of the County Court to provide payment of the Murphy judgment by the levy of an assessment against the lands in Drainage District No. 4.

State ex rel. Watkins v. Macon County Court, 68 Mo. 29;

Buchnell v. Drainage District, 111 S. W. (2d) 956, 233 Mo. App. 921.

V.

A reading of the opinion of Judge Davis in Murphy v. Drainage District No. 4, 17 Fed. Supp. 128, and the opinion of the Court of Appeals in Drainage District No. 4 v. Murphy, 119 Fed. (2d) 390, clearly discloses that such cases are not res adjudicata as to the Respondents in this case nor any other landowners in Drainage District No. 4.

See 17 Fed. Supp., l. c. 132;
119 Fed. (2d), l. c. 394.

VI.

It is Respondent's contention that no right ever existed that could grant authority to the County Court to make an additional assessment against the lands in Drainage District No. 4. But assuming that such right existed, the right of enforcement was barred by the statute of limitations long before the assessment made by the County Court in this case in June, 1941.

Sec. 1013, R. S. Mo. 1939;
Stark v. Zehnder, 102 S. W. 992, 204 Mo. 442;
Hoester v. Sammelmann, 14 S. W. 728, 101 Mo. 619;
Lackland v. Smith, 5 Mo. App., l. c. 164."

At page 39, Respondents' Brief, Missouri State Supreme Court, appears the following:

"(a) The 1913 Act on the point in question is violative of Section 15, Article 2, Missouri Constitution of 1875, which was in force at the time of the 1913 Act. This constitutional provision specifically prohibits the General Assembly from passing any law that would impair the obligation of a contract or that would be retrospective in its operation."

At pages 40 and 41, Respondents' Brief, in Missouri State Supreme Court, appears the following:

"Section 30, Article 2, Missouri Constitution, 1875, provides that no persons shall be deprived of their property without due process of law; of course, this action, if successful, would and could deprive Respondents of their property. They were entitled to a day in Court on this assessment, as the Redman case specifically ruled, and for this additional reason the 1913 Act would be unconstitutional wherein the Legislature attempted to declare, without anyone having

their day in Court, that all existing obligations of Drainage Districts were valid the Legislature violated the due process clause of the Constitution."

It is further admitted that the points relied upon, points and authorities and argument as contained in the Respondents' Brief in the Missouri State Supreme Court was limited to those hereinbefore set out.

V. Bon Geaslin,
Langdon R. Jones,
Attorneys for Petitioner in the United States Supreme Court.

David Baron,
Attorney for Respondents in the United States Supreme Court.

EXCERPTS OF THE 1919 ACT.

In 1919 the General Assembly of Missouri enacted a new article to take the place of Article 4 of Chapter 41 of the Revised Statutes of Missouri, 1909, as amended by the Act of 1913, which new article was to be known as Article 4 of Chapter 41. This article contained Section 17 and Section 57, respectively, which became sections 12413 and 12454, respectively, of the Revised Statutes of Missouri, 1939. Section 12454 reads as follows:

"Proceedings pending not to be affected by this article.—The repeal of article 4, chapter 41, R. S. 1909, entitled 'construction and improvement of ditches, watercourses and levees upon petition of one or more landowners,' shall not have the effect of suspending, abating, abridging, impairing, vitiating, or nullifying any right, power, remedy, or lien heretofore given, created or conferred upon any drainage district here-

tofore organized or in process of organization at the time of passage of this article, under any law of this state, but all such rights, powers, remedies and liens are hereby directly preserved to all such drainage districts; nor shall the repealing of existing laws have the effect of suspending, abridging, abating or nullifying any proceeding or proceedings now pending in any court of this state or of the United States; nor shall the repealing of existing laws have the effect of impairing, invalidating, discharging, changing, modifying or destroying any obligation, contract or undertaking, entered into by, or with any drainage district now organized and existing under any law in this state, but all such obligations, contracts and undertakings so entered into shall be and remain inviolate. All rights, powers, liens and remedies now existing in behalf of any drainage district of this state may be enforced and made available under the provisions of this article, if applicable, at the election of the drainage district. This article is hereby declared to be remedial in character and purposes, and shall be liberally construed by the courts in carrying out this legislative intent and purpose."

Section 12413 reads as follows:

"List and schedule remain permanent record—court may provide additional levies, when. The list and schedule specified in section 12412 shall be prepared in the form of a well-bound book which shall be named and indorsed 'drainage tax record of drainage district number ..... of ..... county, Missouri,' which indorsement shall also be printed or written at the top of each page in said book and the same shall be signed by the county clerk, attested by the seal of the county court and shall hereafter remain a permanent record in the office of said clerk. In case the

proceeds of the taxes levied as herein provided are not sufficient to construct the improvements as described in the report of the viewers and engineer as confirmed by the court, then the court shall make, certify and provide for the collection of such additional tax levies as are necessary to complete the improvement: Provided, however, that the aggregate of all such levies, exclusive of taxes levied for interest on bonds, does not exceed the total benefits assessed and confirmed. If any sum be needed to pay any judgment against the district and upon the filing of a certified copy of said judgment with the clerk of the county court, it shall be the duty of the county court, at the next term, to levy sufficient taxes to pay the same and to add thereto sufficient taxes to pay the interest on said judgment. The court shall levy, certify and provide for the collection of said taxes as hereinbefore provided and shall apportion the same to the lands or other property in proportion to the original assessment of benefits, but not in excess thereof, and if in excess thereof then in such proportion as will not, with other lawful tax levies, made and collected be in excess of the benefits reported by the viewers and confirmed by the court."